Supreme Court, U.S.
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Case No._____

In The
Supreme Court of the United States

IN RE ROBERT M. DAVIDSON and
VANESSA E. KOMAR,
Petitioners

On Petition For Writ Of Mandamus
To The Arizona Supreme Court

PETITION FOR WRIT OF MANDAMUS

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The Petitioners, Robert Michael Davidson and Vanessa Elaine Komar, husband and wife, respectfully pray that a writ of mandamus issue to compel respondents to vacate the final judgments in the State court proceedings under Ariz. R. Civ. P. 60 (c)(4). There has been an egregious usurpation of power by the Arizona judicial system in the State court proceedings, which dwarfs the interests of the litigants. The final judgments have substantially violated the public interest. The interests primarily at stake are governmental and societal.

Petitioners pray that this Court issue a writ of mandamus directed to the Honorable Ruth V. Mc Gregor, Chief Justice of Arizona Supreme Court, the Honorable Rebecca W. Berch, Justice of Arizona Supreme Court, the Honorable W. Scott Bales, Justice of Arizona Supreme Court, the Honorable Michael D. Ryan, Justice of Arizona Supreme Court, and the Honorable Andrew D. Hurwitz, Justice of Arizona Supreme Court, *to compel these respondents to vacate the final judgments in the state court proceedings.*

ISSUES PRESENTED

Issue 1: Petitioners are entitled to vacatur of the "*final judgments*" in the State court proceeding as a matter of law

Issue 2: The *rulings* and "*final judgments*" in the State court proceeding are void

PARTIES TO THE ARIZONA STATE COURT PROCEEDINGS FROM WHOM RELIEF IS SOUGHT

Petitioners

ROBERT M. DAVIDSON;
VANESSA E. KOMAR;

Respondents

RUTH V. MC GREGOR, CHIEF JUSTICE;
REBECCA W. BERCH, JUSTICE;
W. SCOTT BALES, JUSTICE;
MICHAEL D. RYAN, JUSTICE;
ANDREW D. HURWITZ, JUSTICE;

OF THE ARIZONA SUPREME COURT

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2. Order, Division II on September 8, 2005
3. Memorandum Decision, Division II Arizona Court of Appeals on August 18, 2005
4. Memorandum Decision, April 4, 2005, from Ninth Circuit U.S. Court of Appeals (03-17342)
5. Memorandum Decision, April 4, 2005, from Ninth Circuit U.S. Court of Appeals (04-15304)
6. Second Amended Judgment nunc pro tunc, March 23, 2005, in Arizona trial court
7. Amended Judgment nunc pro tunc, January 4, 2005, in Arizona trial court
8. Judgment, November 26, 2004, in trial court
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11. Order, April 29, 2004, in Arizona trial court
12. Mandate, Ninth Circuit: case is dismissed as to appellees Vivra Inc, Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY, U.S. District Court, Arizona District, Case No. CV-03-110-FRZ, Docket No. 61, on April 16, 2004
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16. Order of Arizona Supreme Court re: action taken August 8, 2003 (CV-03-0148-PR)
17. Memorandum Decision of Division II Arizona Court of Appeals on February 27, 2003
18. Order of January 11, 2002, in Arizona trial court

JURISDICTION IN U.S. SUPREME COURT

This petition is filed under 28 U.S.C. § 1257, 28 U.S.C. § 1651(a), and Supreme Court Rule 20. Petitioners seek for mandamus to issue to review orders and opinions that are void *for lack of jurisdiction.*

RELIEF NOT AVAILABLE FROM ANY OTHER COURT

Petitioners are entitled to relief from the *"final judgments" as a matter of law.* Petitioners have been *denied* relief by the Arizona Supreme Court on April 20, 2006, *the highest state court from which relief could have been had.* There are obvious difficulties with the remedy of appeal after final judgment. Extrajudicial prejudice has most definitely *"worked its evil"* and the judgment of it in the Arizona Court of Appeals and Arizona Supreme Court is much worse than *"precarious"*. See *Berger v. U.S.*, 41 S.Ct. 230. There are *"few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself [herself]"* See *Rosen v. Sugarman*, 357 F.2d 794, 797 (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION: Fourteenth Amendment: *"No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".*

ARIZONA CONSTITUTION:

Article 2, Section 4: *"No person shall be deprived of life, liberty, or property without due process of law."*

Article 6, Section 21: "*Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof.*"

ARIZONA RULES OF CIVIL PROCEDURE:

Ariz. R. Civ. P. 5.1: (see Appendix Z)
Ariz. R. Civ. P. 60 (c)(4): "On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: ...(4) the judgment is void; ..."
Ariz. R. Civ. P. 60(c)(6): "...any other reason justifying relief from the operation of the judgment."

RULES OF THE ARIZONA SUPREME COURT:

Rule 91(e): "*Every matter submitted for determination to a judge of the superior court for decision shall be determined and a ruling made not later than sixty days from submission thereof, in accordance with Section 21, Article VI of the Arizona Constitution.*"

ARIZONA CODE OF JUDICIAL CONDUCT:

Canon 3(B)(1): "*A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.*"
Canon 3(B)(8): "*A judge shall dispose of all judicial matters promptly, efficiently, and fairly.*"
Canon 3(E)(1)(a): "*A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.*"
Canon 3(E)(1)(c) states, in relevant part, "*the judge knows that he or she [...] has a financial interest in the*

subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the proceeding."
Canon 3(E)(1)(d)(iii) states, in relevant part, *"the judge [...] is known by the judge to have an interest that could be substantially affected by the proceeding."*

STATEMENT OF THE CASE

The filing of the State court proceeding (a defamation action) in an Arizona trial court in July of 1999, was a conscious attempt by the State court plaintiffs (Jay Grossman and Eudice Grossman) to avoid the very real possibility of a federal court ever reaching the issues surrounding their conduct in interstate commerce over the last two decades, in both Albany, NY and Tucson, AZ. Their *"attack the messenger"* strategy in this *"whistle blower"* action has been extraordinarily successful. In Arizona, the State court plaintiffs (Jay Grossman and Eudice Grossman) have triumphed in the midst of alleged adversity. For alleged *"losses"* in connection with the sale of Grossman's medical practice and the stock purchase and sale of Vivra stock, Grossman has been awarded damages against the Davidsons. By reason of Grossmans' violations of the substantive federal RICO statute, 18 U.S.C. § 1962(b), Grossmans have been awarded damages against Davidsons in a default judgment in the State court proceeding. *See Appendices F, G, H, and HH.* By reason of the concerted acts of the State Actors in the State Action, Davidsons have suffered *actual damages* and deprivation of constitutionally-protected fundamental rights.

The nucleus of operative fact upon which this case is based, centers primarily around the federal court defendants' (Jay Grossman, Eudice Grossman, *and others*) conduct in both Arizona and New York performing clinical research studies on behalf of various pharmaceutical corporate sponsors in support of New Drug Applications. The defendants in the

Federal court proceedings have by the very nature of their business (contract clinical research and specialty medical practice) willfully injected themselves, their business, and their conduct, into the stream of interstate commerce.

This is still a very "*live*" case and controversy.[1] Now that the Arizona Supreme Court has *finally* ruled, there are no "*ongoing state court proceedings*" to bar filing a federal RICO complaint. Davidsons' federal RICO claims have never been litigated. Davidsons request this Court to judicially notice the Supplemental Brief and Petition for Rehearing in U.S. Supreme Court Case No. 04-1687, as they are both material to issues (*mandatory* disqualification and state action) raised in the Petitions presently before this Court.

The "*final judgment*" in the State Court proceeding was a default judgment by a trial judge who failed to disqualify herself *on numerous occasions* under *mandatory* disqualification statutes of the Arizona Code of Judicial Conduct. The default judgment struck Davidsons' counterclaims (assault and battery *in the workplace*), granted Grossmans alleged damages of $7.8 million for alleged defamation and IIED, and entered sanctions against Davidsons, all without ever reaching the merits of the case or Davidsons' constitutional concerns regarding Ariz. R. Civ. P. Rule 5.1 and the Prescription Drug User Fee Act. It is quite clear from the record that both the State trial judge, Jane L. Eikleberry (referred to herein as "JLE") and the Federal District Court judge, Frank R. Zapata (referred to herein as "FRZ") violated *mandatory* disqualification statutes.

Michael J. Meehan (referred to herein as "MJM") was believed to have been an honorable, well-respected, practitioner of law in Tucson, Arizona when Davidsons

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[1]Davidsons were actually prevented from filing their federal Complaint with the U.S. District Court for Northern District of Texas (Case No. 3:06-CV-0920-M) until the Arizona Supreme Court ruled, so as to avoid *a second* dismissal under *Younger* abstention.

retained MJM as their legal counsel on October 13, 1999. Davidsons did not anticipate that MJM would abandon and slander his clients to achieve his judicial ambitions. *See Appendices Q through Z.*

The fact that the entire Arizona judicial system is seemingly in "*lock step*" on this matter should not deter this Court. This is an extraordinary case, imminently suitable for this Court's exercise of supervisory mandamus over a state trial court and state appellate courts. Petitioners have been denied a legal remedy by the Arizona judicial system for seven years due to "*structural errors*" in the State court proceedings *which were no fault of the Petitioners.*

Abbreviated Relevant Procedural History

Davidsons filed Emergency Motion to Stay the Proceedings on September 22, 2004, and Objection to Motion for Entry of Default and Sanctions on September 29, 2004. *Without jurisdiction to act* (in clear absence of all jurisdiction), the State trial court entered default (and sanctions) in Order of November 9, 2004, and "final" Judgment on November 26, 2004. Davidsons timely-filed Notice of Appeal with the trial court on December 8, 2004. *Without jurisdiction to act and without permission from Division II (Division II had jurisdiction, not the trial court),* Amended Judgment (nunc pro tunc) was entered on January 4, 2005, and Second Amended Judgment (nunc pro tunc) was entered by the trial court on March 23, 2005.

Davidsons filed "*Appellants' Expedited Motions: 1. Motion to include Second Amended Judgment (Nunc Pro Tunc) in record on appeal and 2. Motion for relief from "final" judgments under Ariz. R. Civ. P. 60(C)(6)*" with Division II on April 11, 2005. On April 27, 2005, Division II *denied* Appellants' Expedited Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(c)(6). Davidsons filed their *initial "Appellants' Motion to Reconsider"* on May 4, 2005. Division II *denied initial* Appellants' Motion to Reconsider on May 10, 2005.

On August 18, 2005, the Memorandum Decision of Division II *affirmed* the rulings and judgments of the trial court. Davidsons filed their *second "Appellants' Motion to Reconsider" with affidavit and exhibits,* on August 30, 2005. Division II *denied second* Appellants' Motion to Reconsider on September 8, 2005.[2] Petition for Review by Arizona Supreme Court *with affidavit and appendices,* was timely-filed on September 21, 2005, with Division II.

On April 20, 2006, *almost seven months after Davidsons filed Petition for Review,* the Arizona Supreme Court *denied* Petition for Review, *denied* Motion to Expedite Petition for Review, *denied* Motion to Vacate Final Judgments under Rule 60(c)(4), and *denied* Renewed Motion to Expedite Petition for Review.

Standard of Review

In the Seventh Circuit mandamus review of disqualification rulings is *de novo.* Appellate review of a judge's decision not to disqualify himself [herself] under *mandatory* disqualification statutes, should not be deferential. The Constitutional Due Process deprivation entailed by the trial judge's and Division II judges' *repeated* failures to disqualify themselves in the state court proceedings calls for application of the *de novo* standard of review. No presumptions of "*good cause*" should be afforded to judges who *repeatedly* fail to comply with *mandatory* disqualification statutes. There exist a class of constitutional errors that "*necessarily render a trial fundamentally unfair*" and these are not amenable to harmless error analysis. Harmless error analysis "*presupposes a trial, at which the defendant, represented by counsel, may present*

[2]There were two entirely separate and distinct filings captioned "*Appellants' Motion to Reconsider*", filed on May 4, 2005, and on August 30, 2005, *both of which were denied by Division II,* on May 11, 2005, and on September 8, 2005, respectively.

evidence and argument before an impartial judge and jury". The trial judge's and Division II judges' *repeated* failures to disqualify themselves denied Davidsons the "*basic trial process*" in the State court proceedings.

WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION

The Arizona Trial Court, Arizona Court of Appeals (referred to herein as "Division II"), and Arizona Supreme Court, need to be confined to a lawful exercise of their prescribed jurisdiction. Petitioners are victims of an *egregious judicial usurpation of power.*

The question of tribunal's jurisdiction was raised before Division II: (a) at paragraph 2, page 2, and paragraphs 1 and 2, page 3, of "*Appellants' Expedited Motions: 1. Motion to Include Second Amended Judgment Nunc Pro Tunc in Record on Appeal and 2. Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(C)(6)*" filed on April 11, 2005; (b) at paragraphs 2 and 3, page 2, and paragraphs 1-3, page 3, and pages 4-6, of "*Appellants' Reply to Appellees' Response to Appellants' Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(C)(6) and Appellants' Response to Appellees' Motion to Amend Record on Appeal*", filed on April 28, 2005; (c) at page 1 of *first* filing captioned "*Appellants' Motion to Reconsider*" filed on May 4, 2005; and (d) at pages 1-3 of *second* filing captioned "*Appellants' Motion to Reconsider*" *with affidavit and exhibits*, filed on August 30, 2005.

The question of tribunal's jurisdiction was raised before Arizona Supreme Court: (a) at pages 1-3 and paragraph 3 at page 9 of Petition for Review *with affidavit and exhibits*, filed on September 21, 2005; (b) at pages 4, 5, 8, and 10-18, of "*Motion to Vacate Final Judgments under Rule 60(C)(4)*" *with affidavit and exhibits*, filed on or about February 20, 2006; and (c) in "*Renewed Motion to Expedite Petition for Review*", *with affidavit and exhibits*, filed on March 24, 2006.

Violations of *Mandatory* Disqualification Statutes

The trial judge had disqualifying knowledge (*actual knowledge of her direct personal interest in the outcome of the litigation and personal extrajudicially-acquired knowledge of disputed evidentiary facts concerning the proceeding*) at the time she entered the Order of November 9, 2004, which entered default and sanctions against Davidsons, and struck their counterclaims. The trial judge had disqualifying knowledge at the time she entered the Order of April 29, 2004, which denied Petitioners' Motion to Amend Answer to Add Counterclaims, and Add Parties. The trial judge had disqualifying knowledge at the time she entered the Order of January 11, 2002, which dismissed Petitioners' retained counsel of record.

A reasonable person, *knowing all the facts*, would have reasons to seriously doubt that the trial judge was impartial towards the Petitioners in a proceeding in which she ordered a *default* judgment against them for $7.8 million, after stripping them of their retained counsel of record *by fiat of the trial court*, and after denying them the right to argue and prove *pattern* of misconduct and *conspiracy* in the State court proceeding. Appendices I, J, and V, should be read in the context from which they arose. *See Appendices Q through Z.*

Constitutional Due Process and Equal Protection Deprivation under the 14th Amendment

Petitioners have been deprived of fundamental rights to due process, equal protection, and the *presently-enjoyed* benefit (liberty and property interest) of retained legal counsel, by *invidiously discriminatory* applications of the Arizona Canons of Judicial Conduct and the Arizona Rules of Civil Procedure Rule 5.1 to the Davidsons. In this case the Arizona judicial system has set a *new standard* for the non-disqualification of

judges, which is violative of the 14th Amendment of the U. S. Constitution.

Withdrawal of counsel and failure to comply with *mandatory* disqualification statutes by the State trial judge and appellate judges in the state court proceedings, deprived Davidsons of 14th Amendment Due Process and Equal Protection. These Judges *all* knew that Thomas A. Zlaket's term as Chief Justice was due to expire at midnight on Monday, January 7, 2002. *See Appendix W.* The State trial Judge had *actual* knowledge of MJM's judicial ambitions *prior* to her Order of January 11, 2002, which dismissed Davidsons' retained counsel of record. These Judges *all* knew that a lawyer (MJM) and law firm (QBSL) who maliciously abandon and slander their clients, for personal political and financial gain, under color of law, acting in concert with the trial judge and opposing legal counsel, represents an exception to the doctrine of judicial immunity. These Judges *all* knew that the State trial judge *and others* were named as State Actors in the State court proceedings.

The trial judge and named Division II Judges and Supreme Court Justices, had personal, extrajudicially-acquired knowledge that the Motion to Withdraw as Counsel of Record was a willful, malicious violation of Davidsons' civil rights, motivated by bad faith (evil intent), an improper motive (personal political and financial gain), and with deliberate reckless indifference to the federally-protected rights of the Davidsons.

Davidsons request that this Court judicially notice Canon 3(B)(8) of the Arizona Code of Judicial Conduct, Rule 91(e) of the Rules of the Arizona Supreme Court, and Article VI, Section 21 of the Arizona Constitution, *found at pages 2 and 3 of this Petition.* It is unconscionable *(sanctionable)* that Division II and the Arizona Supreme Court simply sat on the Petition for Review *for nearly seven months* without a final ruling. *This unreasonable delay in making their final ruling deprived Davidsons of due process and equal protection.* There is no justifiable reason for such a delay. By

reason of this *invidiously discriminatory* delay, Arizona Supreme Court has caused direct injury (*actual damages*) to Davidsons. Malice by Arizona Supreme Court towards Davidsons can be inferred.

A reasonable person, *knowing all of the facts*, would have reasons to seriously doubt the ability of the Arizona Commission on Judicial Conduct to conduct an unbiased factual inquiry into the circumstances for the "*delay*" in this matter, after learning that Judge J. William Brammer, Jr., chairman of the Commission conducting such an inquiry, had been named as a State Actor in the State Action. Division II Judge J. William Brammer wrote the Memorandum Decision of August 18, 2005, which affirmed the rulings of the trial court. *See Appendices C and T.*

Disqualifying Extrajudicial Knowledge

Davidsons learned in August 2005, that their former counsel of record, MJM, was candidate for several vacancies on the bench of Division II and Arizona Supreme Court from 2002 to 2003, during the time when interlocutory appeal and petition for review were before the Arizona appellate courts. *See the Affidavit and Exhibits 1 through 14 of Appellants' Motion to Reconsider to Division II file-stamped on August 30, 2005.*

The trial judge's *actual knowledge* of MJM's candidacy for several appellate court vacancies on the Arizona bench from 2002 to 2003, while interlocutory appeal (to Division II and Arizona Supreme Court) was pending, and prior to "*final Judgment*" in the State court proceeding, gives rise to estoppel as a matter of law. See *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194. *The State trial Judge had actual knowledge of MJM's judicial ambitions prior to her Order of January 11, 2002, which dismissed Davidsons' retained counsel of record. Both MJM and the State trial judge (JLE) knew that Thomas A. Zlaket's term as Chief Justice was due to expire at midnight on Monday, January 7, 2002. See Appendix W.*

The State trial Judge was incapable of "*holding the balance true*" between Davidsons' rights and MJM's rights, when she had *actual knowledge* of MJM's judicial ambitions and candidacy for the Arizona bench. The State trial Judge's rulings favored MJM's judicial ambitions and MJM's subsequent candidacy at the expense of Davidsons' right to a fair trial. The State trial Judge's extrajudicially-acquired, personal bias represents *structural error* in the constitution of the trial process.

The trial judge was named as a State Actor in *both* of two prior Petitions for Writ of Certiorari. See U.S. Supreme Court docket # 04-537, filed on September 17, 2004, and U.S. Supreme Court docket # 04-1687, filed on June 13, 2005. State trial Judge JLE had *actual knowledge* of her joint and several liability (*direct pecuniary interest*) to the Davidsons for $15MM in compensatory and $60MM in punitive damages, *prior* to the Order of November 9, 2004. The State trial Judge had *actual knowledge* of Document #93 Index of Record ("Motion to Amend Defendants' Answer, to Add Counterclaims, and Add Parties", filed on or about February 26, 2004). *See Appendix K at App. 40* where it states,

> "*Under the Uniform Contribution Among Tortfeasors Act, joint and several liability is preserved for true joint tortfeasors, including those "acting in concert" and those who are vicariously liable for the fault of others.*"

State trial Judge had *actual knowledge* of interlocutory Appeal to Division II. See pages 2 and 6 of Reply Brief in 2 CA-CV 2002-0051 to Division II. State trial Judge had *actual knowledge* of the federal court proceedings against MJM and QBSL. Davidsons request this Court to judicially notice Page 20 of "Plaintiffs' Original Complaint & Application for Injunctive Relief", the prayer for compensatory and punitive damages and signature page from U.S. District Court Case No. 03-CV-00580-FRZ, filed on

November 20, 2003, where it states, "*Enter judgment for plaintiffs and award the plaintiffs $15MM in compensatory and $60MM in punitive damages, against the defendants and each of them and in favor of the plaintiffs.*" *See Appendix O at App. 53.* See page 30 (Issue #4) of Petition for Writ of Certiorari before Judgment (U.S. Supreme Court docket # 04-537).

It is beyond dispute that the State trial judge JLE was disqualified by *actual knowledge* of her personal interest in the outcome of the litigation, which is direct, certain, and immediate. Only one inference can reasonably be drawn from the evidence. Estoppel may be a question of law, when the facts are not in dispute or are beyond dispute. *See 28 Am. Jur. 2d Estoppel and Waiver Section 188. See Appendix I at App. 34.*

The Order of April 29, 2004, is void. The Order of November 9, 2004, is void, and has retroactive application to earlier rulings. See *Appendices I and J. The trial judge's mandatory disqualification is jurisdictional and cannot be waived by the parties.* Arizona Supreme Court should have granted Motion to Vacate "Final" Judgments under Rule 60(C)(4) *as a matter of law.* This Court has the power to exercise its extraordinary remedy of supervisory mandamus to right the injustice of the Arizona Supreme Court's *denial* of Motion to Vacate. *It is very much in the public's interest that no man (or woman) should be judge over himself (herself).*

The trial judge's *repeated* violations of *mandatory* disqualification statutes deprived the trial court of subject matter jurisdiction to enter the Order of January 11, 2002, which dismissed Davidsons' retained legal counsel. *Where a disqualification statute also provides that a judge must not sit in a case in which he or she is disqualified, the disqualification is generally held to be jurisdictional and cannot be waived by the parties.* See *Pahl v. Whitt* 304 SW.2d 250.

If two federal U.S. District Court judges [the Honorable John M. Roll and the Honorable David C. Bury] had a <u>non-discretionary</u> duty to disqualify

themselves when 28 U.S.C. § 455(b)(1) applied, the State court judges [including trial Judge JLE and certain named Division II Judges] had a comparable *non-discretionary* duty as a matter of law to disqualify themselves when Canon 3(E)(1)(a) applied. For evidence of the federal judges' disqualification, see the PACER docket entries for CV-03-580-FRZ (*Davidson v. Meehan*).

Memorandum Decisions of Division II

See the Memorandum Decision of Division II (Appendix R, ¶ 4 at App. 57) where it states,

> *"Although we might agree that the rights to which Davidson refers are substantial, we cannot agree that the trial court's order permitting his counsel to withdraw determined the action that the Grossmans filed against him. That "order did not finally dispose of the case, leaving no question open for judicial determination." Eaton v. Unified Sch. Distr. No. 1 of Pima County, 122 Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979). The order simply allowed Davidson's attorney to withdraw his representation and continued the date for a trial on the merits."*

This Court should read *both* of Division II's opinions, found as *Appendices C and R* (quoted in part, above), from the perspective of the facts found in *Appendices Q through Z*. Division II Judges J. William Brammer and John Pelander interviewed on May 10, 2002, with MJM for the same Supreme Court vacancy created by the retirement of Justice Thomas A. Zlaket. MJM and Division II Judge John Pelander were both candidates in November 2002, for the opening created on the Arizona Supreme Court bench by the anticipated retirement of Justice Stanley Feldman. MJM was one of 10 applicants (including Peter J.

Eckerstrom) in March 28, 2003, for the opening on Division II created by the retirement of Division II Judge William E. Druke. Judge William E. Druke retired on February 28, 2003, just one day after the Memorandum Decision (by William E. Druke, with Philip G. Espinosa and John Pelander, concurring) which dismissed interlocutory appeal (2CA-CV 2002-0051). Division II Judge J. William Brammer wrote the Memorandum Decision (with Peter J. Eckerstrom and M. Jan Florez, concurring) of August 18, 2003, which affirmed the rulings and judgments of the trial court.

A reasonable person, *knowing all of the facts*, would have reasons to seriously doubt the ability of the Arizona Commission on Judicial Conduct to conduct an unbiased factual inquiry into the circumstances surrounding alleged *mandatory* judicial disqualifications, after learning that Judge J. William Brammer, Jr., chairman of the Commission conducting such an inquiry, had been named as a State Actor in the State Action.

The Memorandum Decision of Division II has relied upon the Grossmans' rendition of the factual and procedural background of this case. *See App. 4, footnote 1, of Appendix C.* Please also note the *footnote 3 at App. 5*, wherein Division II Judge Brammer dismisses the interlocutory appeal as a *"procedural impropriety"*. Judge Brammer knew that there was not *"good cause appearing therefore"* to justify MJM's malicious abandonment and slander of his clients. Judge Brammer does an efficient [*albeit specious*] job of quoting Grossmans' counsel of record (Bruce R. Heurlin) wherein he cites *"Davidsons' [alleged] failure to participate ... and repeated attempts to delay the proceedings and to harass the Grossmans with frivolous filings." See App. 6, ¶ 6.*

Footnote 4 at App. 7 of Appendix C is very misleading and needs clarification. *Davidsons' filing of two additional Notices of Appeal was necessitated by Grossmans' filing of two Amended Judgments, both nunc pro tunc, and* <u>*both Amended Judgments were*</u>

entered without permission from Division II (Division II had jurisdiction, not the trial court). Davidsons were of the belief at the time that because of the trial judge's repeated refusals to take jurisdiction over their Motions to Vacate the Judgments, that the subsequent *"final (amended twice) judgments"* had to also be appealed, to preserve their right to appeal.

Davidsons submitted (*pro se*) a Notice of Appeal (*see Appendices VV-VVVV*) with the trial court on February 11, 2002, from East Texas, after having relocated *about 1200 miles*, to take new employment. Contrary to the impression given by Judge Brammer at App. 7-9, ¶ 10-12, *Davidsons never waived their right to appeal the Motion to Withdraw as Counsel of Record and the Order granting withdrawal, either expressly or by their conduct. Waiver is one of the reasons given by Division II for not reaching the constitutionality of Arizona Rule 5.1 and the issue of State Action. See Petition for Review to Arizona Supreme Court at pages 4 through 6, which specifically address the question of waiver.*

Judge Brammer is quite correct in his footnote 7 at App. 9 of the Memorandum Decision, where he states, *"The Davidsons also contend Meehan, his law firm, the Grossmans, and the trial judge 'conspired with each other, as State Actors,' to deprive them of their constitutionally-protected property interest in retained legal counsel."* However, Judge Brammer is quite incorrect where he states, *"Because this contention is unsupported by any legal authority, we do not address it."*

The aforementioned false assertion (alleged lack of authoritative legal support) by Division II is one of the reasons given by Division II for not reaching the constitutionality of Arizona Rule 5.1 and the issue of State Action. Both of these issues were properly raised before Division II. Davidsons refer this Court to the Opening Brief and Reply Brief in 2CA-CV 2005-0011 and to Appellants' Motion to Reconsider to Division II on August 30, 2005. *Division II's allegation of waiver*

(at App. 7-9) and false assertion of lack of legal authority (at footnote 7, App. 9) are the sole bases given for not reaching the federal questions raised by Davidsons in the State court proceedings. There is no adequate state law basis for not reaching the federal questions raised by the Davidsons in the State court proceedings.

See page 14 of the Reply Brief to Division II, where it states, "*Liability may attach to MJM and QBSL and the Trial Judge under 42 USC Section 1983, 42 USC Section 1985, and 42 USC Section 1988, because the acts complained of were done outside the scope of their duty. See Carruth v. Geddes, 443 F.Supp. 1295.*" Davidsons cited 42 U.S.C. § 1983 and § 1985, on numerous occasions on Appeal to Division II. *See Issues #1, 2, and 3 of the Opening Brief to Division II in 2CA-CV 2005-0011. This Court is especially referred to Issues #1 and #2 of the Reply Brief to Division II where twelve authorities and statutes are cited, including 42 U.S.C. § 1983, § 1985, § 1988, and the Due Process clause of the 14th Amendment.*

The arguments put forward by Judge Brammer in ¶ 18-22, App. 12-14 of Appendix C, are *all based on an abuse of discretion standard of review.* Davidsons did not learn of the disqualifying predicate facts until August 2005. *The State Actors, however, knew of the disqualifying facts (extrajudicial personal knowledge), for more than four years.* Davidsons immediately brought the disqualifying facts to the attention of Division II in Appellants' Motion to Reconsider on August 30, 2005, *with affidavit and exhibits.* It is unconscionable *(sanctionable)* for Division II and Arizona Supreme Court to deny the reality of their disqualifying extrajudicial knowledge. *De novo* review of their repeated denials of Davidsons' *multiple* motions for vacatur (under Ariz. R. Civ. P. 60(c)(6) and 60(c)(4) is clearly warranted. Davidsons have overcome the presumption of impartiality of the State court adjudicators by demonstrating the existence of circumstances indicating a probability of bias too high

to be constitutionally tolerable. See *McIlwain v. U.S., 104 S.Ct. 409.*

Judge Brammer's argument at ¶ 22 and ¶ 23 of Appendix C (App. 14 and 15) is *totally bogus. The trial court entered default and sanctions against Davidsons because of actual knowledge of her direct personal interest which could have been substantially affected by the proceeding.* The arguments put forward by Division II in ¶ 24 are completely self-serving, argued in bad faith, and *warrant sanctions by this Court.* See ¶ 26 at App. 16 where it states, *"We reject the Davidsons' assertion of bias."* Division II has been disqualified for more than four years. The extrajudicial prejudice which infected the State court proceedings has had a *"very long time to work its evil"*. A reasonable person, *knowing all the facts,* would have reasons to seriously doubt the impartiality of Division II.

Of course, Judge Brammer makes no mention of the great prejudice to the Davidsons in failing to disqualify themselves and the great prejudice to the Davidsons in the motion to withdraw as counsel and the coerced dismissal of Davidsons' retained counsel of record *by fiat of the trial court.* Nor does the Arizona Supreme Court provide any explanation for their *inexcusable seven month delay in ruling* on Petition for Review.

Motions to vacate under Ariz. R. Civ. P. 60(c)(4) and Ariz. R. Civ. P. 60(c)(6) can be made any time in the proceedings, even on appeal from final judgment. *See Appendix A. See pages 3 through 9 of Appellants' Expedited Motions dated April 8, 2005, to Division II. See pages 1 through 4 of Appellants' Motion to Reconsider with affidavit and exhibits, filed-stamped on August 30, 2005. See Issue #6 of Opening Brief to Division II. See pages 1 through 3 of Petition for Review to Arizona Supreme Court.* On *numerous* occasions the trial court refused to rule on Davidsons' Motions to Vacate judgments, claiming lack of jurisdiction, untimeliness, or both.

Arizona's procedural rules were not a sufficient basis upon which to deny review, either on interlocutory appeal or on appeal from final judgment, of Davidsons' constitutional issues in the State court proceedings. *See paragraph 3, page 4, and paragraphs 1-3, page 6, of Petition for Review to Arizona Supreme Court.* The Order of January 11, 2002, was the Order appealed from in interlocutory appeal to Division II (2CA-CV 2002-0051) and passed on by Division II in the Memorandum Decision of February 27, 2003. *See Appendix R.* While Division II "*might agree*" that *fundamental rights* were involved, they alleged that state procedural rules precluded their needing to reach the federal constitutionality of Arizona Rule 5.1.

In retrospect, it is quite foreseeable that the State Actors would be unable to judge themselves fairly. "*A person cannot be a judge of his or her own cause.*" See *Smith v. Smith, 115 Ariz. 299.* This is both a matter of *public policy* and a matter of law. The trial judge's and Division II judges' failures to disqualify themselves under Arizona's *mandatory* disqualification statutes is jurisdictional and cannot be waived.

Rulings and "*final judgments*" are void

The trial judge's Orders of January 11, 2002, April 29, 2004, and November 9, 2004, were improperly reviewed by Division II, *when they had no jurisdiction or power to consider these matters. Davidsons did not learn of the existence of disqualifying facts until August of 2005.* Division II's *denial* of Appellants' Motion to Reconsider, submitted on August 30, 2005, is void. Division II's affirmation of the trial court is void because the rulings and judgments of the trial court are

void.[3] *See Petition for Writ of Certiorari which accompanies this Petition.* Division II's affirmation is also void because the Division II Judges who rendered the Memorandum Decision of February 27, 2003, and the Memorandum Decision of August 18, 2005, are disqualified by *actual knowledge of their personal interest in the outcome of the litigation, personal extrajudicially-acquired knowledge of disputed evidentiary facts concerning the proceeding,* and *appearance of partiality.*

Davidsons request this Court to judicially notice the Canons of the Arizona Code of Judicial Conduct, *found at pages 3 and 4 of this Petition.* Canon 3(B)(1) states, *"A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."* Under state law, if a judge is disqualified, that disqualification strips the court of subject matter jurisdiction. See *Ellentuck v. Klein*, 570 F.2d 414 (2nd Cir 1978). If the disqualification is of a nature that cannot be waived, or is considered as founded in public policy, the act of a disqualified judge is absolutely void. This is also true where the constitution or statute creating the disqualification by *mandatory* provision prohibits the judge from acting. See *C.J.S. Judges Section 323.*

EXCEPTIONAL CIRCUMSTANCES WARRANT EXERCISE OF COURT'S DISCRETIONARY POWERS

Petitioners have established that they have a *clear right to the requested relief.* Respondents owed a clear nondiscretionary duty. Petitioners have *exhausted all other avenues of relief and review by other means is not*

[3]If this Court holds that the trial judge's Order of January 11, 2002, is void, Davidsons have still sustained legally-cognizable constitutional injury under color of Arizona Rule 5.1 *(see Appendix Z)* because of the immediate injury to the Davidsons in the *"gap interval"* caused by the Motion to Withdraw. Davidsons' assertion that Ariz. R. Civ. P. Rule 5.1 is repugnant to the U.S. Constitution is, therefore, not made moot by the trial judge's failure to disqualify herself.

possible. An extraordinary remedy by this Court is called for because *this is a truly extraordinary cause. There are exceptional circumstances in this case amounting to a judicial usurpation of power.*

Manifest Abuse of Authority

"*Final judgments*" (Judgment, Amended Judgment Nunc Pro Tunc, and Second Amended Judgment Nunc Pro Tunc) have been rendered by the Arizona trial court. *The subject matter of the "final judgments" was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority.* Mandamus is proper in egregious jurisdictional violations such as that found in C333954.

Public policies favoring finality over validity of judgments presuppose that fair opportunity is available to contest subject matter jurisdiction in the court whose jurisdiction is in question. Davidsons' challenge to the subject matter jurisdiction following a default judgment was *never litigated by any state court.* Davidsons were denied the opportunity to litigate the question of jurisdiction by *exceptional circumstances.* Davidsons never had their day on the merits, even if before a body whose authority is in doubt. The public interest would be well served by granting mandamus because *the tribunal's excess of authority was plain* and has *infringed a fundamental constitutional protection.* See *Restatement (Second) of Judgments, Section 12.*

Petitioners have *a clear right* to relief

The setting aside of judgment in equity on showing of extrinsic fraud is permitted because such fraud corrupts judicial power and serves to turn court of law into instrument of injustice. See *Southeastern Colorado Water Conservancy Dist. v. Cache Creek Min. Trust*, 854 P.2d 167. To constitute fraud on court justifying relief from judgment, conduct must be so egregious that it involves corruption of judicial process. See *Village of Chefornak v.*

Hooper Bay Const. Co., 758 P.2d 1266. *The State court proceeding corrupted judicial power and turned a court of law into an instrument of injustice. The State court proceeding involved conduct by the State Actors which was so egregious that it corrupted the judicial process.*

If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under statute to the injured party. See *In re Estate of West*, 415 N.W.2d 769. *The predicate facts in the State court proceeding establish that Davidsons' lawyer (MJM) colluded with his law firm (QBSL), Bruce R. Heurlin (Grossmans' retained counsel), the trial judge (JLE), and others, in a material and factual misrepresentation which constituted an intentional fraud or deceit and resulted in a judgment adverse to the interests of the Davidsons. Acting by agreement and in concert,* the Arizona courts have *serially* denied Davidsons' motions for relief from the "*final judgments*", the most recent denial being the Arizona Supreme Court ruling on April 20, 2006. *See Appendix A.*

The right of a court to vacate or modify judgment is not limited to showing that it was procured by actual fraud, collusion, and misrepresentation, but *it is sufficient if there is a showing that the rights of interested parties are prejudicially affected by the judgment and if there was inadvertently a withholding from the court of matters which should have been properly before it,* but for which withholding the judgment would not have been rendered. See *Pengelly v. Thomas*, 65 N.E.2d 897. For the purposes of an action to annul a judgment, *conduct which prevents an opposing party from having an opportunity to appeal or to assert a defense constitutes a deprivation of legal rights.* See *Clulee v. Louisiana Materials Co., Inc.*, 590 So.2d 780.

Davidsons' rights were prejudicially affected by the unreasonably delayed "final judgments" of the Arizona Supreme Court and that there was a willful, malicious,

withholding from the court of matters which should have been properly before it, which prevented the Davidsons from having an opportunity to appeal from "final judgments" of the Arizona Supreme Court to the U.S. Supreme Court.

Extrinsic Fraud in Procurement of Judgment

Davidsons were prevented from having a fair trial of the real issues by reason of the fraudulent contrivance of his adversaries. See *C.J.S. Judgments Section 309. "The fraud that vitiates a judgment is a fraud which goes to its procurement."* See *Mekelburg v. Whitman*, 545 S.W.2d 89. "*Extrinsic fraud*", such as will justify relief from judgment procured thereby, is collateral conduct unrelated to fact finder's decision, such as conduct that keeps party in ignorance of action, false offers of compromise, attorney's betrayal of client's interest to adversary, and other acts of similar nature. See *JRD Development Joint Venture v. Catlin*, 840 P.2d 737.

The State court proceeding is distinguished from *JRD Development Joint Venture v. Catlin* in that the "*collateral conduct*" in C333954 was directly related to the trial judge's (fact finder's) decisions, because the trial judge was a *joint participant* in the corrupt conspiracy (the State Action) to defraud the whistle blower (the Davidsons) and deprive Davidsons of constitutional rights. JLE had *actual knowledge* that there was not "*good cause appearing therefore*" upon which to base the Order of January 11, 2002. So too did certain named Division II Judges and Arizona Supreme Court Justices[4] have personal, extrajudicially acquired knowledge of disputed evidentiary facts concerning Davidsons' attorney (MJM).

4Two *current* sitting Arizona Supreme Court Justices, Michael D. Ryan and Andrew D. Hurwitz, were interviewed on May 10, 2002, along with MJM, for the Supreme Court vacancy created by the retirement of Justice Thomas A. Zlaket. Two *current* sitting Arizona Supreme Court Justices, Andrew D. Hurwitz and W. Scott Bales, were candidates in December 2002, along with MJM for the Supreme Court vacancy created by the retirement of Justice Stanley Feldman. *See Appendices P through Z.*

These judges had *actual knowledge* that MJM's and QBSL's Motion to Withdraw was in no way motivated by "*good cause*". To the contrary, *the trial judge and named Division II Judges and Supreme Court Justices, had personal, extrajudicially-acquired knowledge that the Motion to Withdraw as Counsel of Record was a willful, malicious violation of Davidsons' civil rights, motivated by bad faith (evil intent), an improper motive (personal political and financial gain), and with deliberate reckless indifference to the federally-protected rights of the Davidsons.*

See Petition for Writ of Certiorari before Judgment (U.S. Supreme Court docket # 04-537) at page 29 where it states,

> *"By information and belief, Q&BSL and MJM knew the substance and content of the "Prosecution Memorandum" before they filed their Motion to Withdraw as counsel of record in the State court proceeding. Yet, Q&BSL and MJM agreed [with each other] to continue to refuse to bring Arizona fraud, Arizona RICO, and federal RICO actions, on behalf of their then clients, the Davidsons, despite repeated requests by the Davidsons to bring such actions."*

Davidsons did not realize at the time that the object of the aforementioned *repeated* refusals to bring fraud and racketeering actions on behalf of their clients, and the object of their Motion to Withdraw, was not solely to permanently deprive the Davidsons of a legal remedy for the injuries wrought upon them by the Grossmans and others acting in concert, and avoid their contractual and professional responsibility to the Davidsons, just four months before the scheduled trial date, but was also intended to conceal the racketeering conspiracy which had been ongoing for nearly two decades, in both New York and Arizona, and facilitate MJM's candidacy for anticipated vacancies in the Arizona Supreme Court and Division II.

Hidden facts indicating partiality may at any time come into public view and therefore are legitimate elements of an appearance test. See *Idaho v. Freeman*, 507 F. Supp. 706 (1981). Predicate facts establish that MJM and QBSL were not acting within the scope of their duties as Davidsons' retained legal counsel (*they were not performing professional acts*) when they abandoned their clients in their Motion to Withdraw as Counsel of Record on December 17, 2001. As soon as the *initial* predicate facts became known to the Davidsons (August 2005), they sought to make them part of the record in the State court proceedings. *Predicate facts are found: (a) as Exhibits to Appellants' Motion to Reconsider filed on August 30, 2005, with Division II, (b) as Exhibits to Petition for Review on September 21, 2005, to Arizona Supreme Court, (c) as Exhibits to Motion to Vacate "Final" Judgments under Rule 60(c)(4) filed on February 21, 2006, with Arizona Supreme Court, (d) as Exhibits to Renewed Motion to Expedite Petition for Review filed on March 24, 2006, with Arizona Supreme Court, and (e) as Appendices to Reply Brief to Division II in 2CA-CV 2005-0011.*

The trial judge admitted to having read Davidsons' first Petition for Writ of Certiorari (*filed with this Court on September 17, 2004*) in the Order of November 9, 2004. The trial judge, therefore, admitted to having actual knowledge of her *"financial interest in the subject matter in controversy [...] or any other interest that could be substantially affected by the proceeding"*. The Order of November 9, 2004, therefore, represents an actual admission of having *knowingly* violated Arizona's *mandatory* disqualification statutes. Davidsons are entitled to relief from "*final judgments*" as a matter of law. The invalidity of the "*final Judgment*" appears on the face of the record. *See Appendix I at App. 34.*

A judge *must* disqualify himself or herself if he or she is a party to the lawsuit, or otherwise has any direct interest in the outcome of the litigation. There are no provisions for exceptions or waivers to this principle. It is fundamental to due process that no one may judge his [her] own case, and therefore any judge who is named a

direct party to the litigation *must step aside. Both of Davidsons' petitions for writ of certiorari named the State trial judge as a State Actor in the State Action.* Davidsons request this Court to judicially notice both petitions for writ of certiorari (U.S. Supreme Court docket # 04-537, filed September 17, 2004, and docket # 04-1687, filed June 13, 2005) where Davidsons allege State Action by State Actors *acting in concert* in the State court proceedings. It is indisputably and incontrovertibly true and "*a matter of common knowledge*" that State trial judge was named as a State Actor in the State Action. See *Am. Jur. Evidence Section 31.* See Issue #1 (at pages 9-16) and Issue #4 (at pages 25-30) in Petition for Writ of Certiorari before Judgment to the U.S. Supreme Court (docket # 04-537). See Issue #2 (at pages 8 through 15) in Petition for Writ of Certiorari to the U.S. Supreme Court (docket #04-1687). See Issue #5 (at pages 31-35) of Opening Brief to 2 CA-CV 2005-0011.

Davidsons have established *actual bias* by the State trial Judge in the State court proceedings. This Judge failed to disqualify herself *repeatedly* and made numerous rulings (including the Order of January 11, 2002, Order of April 29, 2004, and Order of November 9, 2004) and Judgments in the proceeding which called for discretion. Her *personal bias* in favor of MJM and QBSL, based upon her *direct personal interest* in rulings favorable to the State Actors, resulted in numerous rulings and Judgments in the State Action which had direct and substantial deleterious impact upon the Davidsons. The *personal bias* and prejudice demonstrated was of such a character as would disqualify the judge *by reason of public policy.* The state trial Judge's proclivities were *indisputably* prejudicial to the Davidsons.

The reasonable person standard applies to Arizona Code of Judicial Conduct, Canon 3(E)(1). "*The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact*". The predicate facts provide personal circumstances where the trial judge and certain named Division II appellate judges' impartiality might reasonably be

questioned. The predicate facts provide an extrajudicial source of evidence from which a reasonable person can apprehend personal bias or prejudice by the trial judge and by certain named Division II appellate judges against the Davidsons and in favor of MJM, QBSL, the trial judge, and certain named Division II appellate judges. Davidsons have met their burden of alleging and proving facts which create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.

Issue #1: Petitioners are entitled to vacatur of the "*final judgments*" as a matter of law

Petitioners incorporate here by reference all of the arguments more fully argued above. The fact that a judgment was obtained through fraud or collusion is generally held to constitute a sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered. Petitioners allege extrinsic fraud and collusion in the procurement of final judgments, resulting in a continuing constitutional tort by the State Actors in the State Action upon the Petitioners. Petitioners allege a corrupt conspiracy which employed fraud *by the court* upon the Petitioners in the State court proceeding.

The inexcusable seven month delay by Division II and Arizona Supreme Court in entering final judgment represents a willful denial of due process and equal protection in the State court proceedings. By reason of the delay, Petitioners have suffered irreparable injury. Malice may be presumed from the predicate facts. If there are intervening interests of reliance on the "*final judgments*", Petitioners' challenge to subject matter jurisdiction, should still be permitted because Petitioners were deprived of due process by this unreasonable delay. Ill practice justifies annulment of a judgment even though no actual fraud or intentional wrong is shown. See *Washington v. Lee Tractor Co., Inc.*, App. 5 Cir., 526 So.2d 447.

Statutes disqualifying judges on the ground of interest are absolute, *mandatory*, and jurisdictional. They will be liberally construed. See *State v. Thomas*, 99 Fla. 562, 126 So. 747 (1930). It is beyond the scope of legislative authority to confer on a party to a controversy or one interested therein, the power to act as judge in such cause. See *48 C.J.S. Judges Section 267.* Petitioners have established, by clear and convincing evidence, that the State trial judge was disqualified on the ground of interest. The State trial judge violated her duty to disqualify herself when Canons 3(B)(1), 3(E)(1), 3(E)(1)(a), 3(E)(1)(c), and 3(E)(1)(d)(iii) of the Arizona Code of Judicial Conduct applied.

"*Structural errors*" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards *and require reversal.* See *State v. Dorsey*, 701 N.W.2d 238. The State trial judge's extrajudicially-acquired, personal bias represents structural error in the constitution of the trial process. The State trial judge's coerced dismissal *by fiat of the trial court* of Petitioners' retained counsel of record, violates due process and amounts to structural error, and this cannot be harmless error regardless. This constitutional "*error*" had a profound prejudicial impact on the outcome of the Petitioners' case. Both the denial of counsel and judicial bias were structural errors which affected the composition of the record in the State court proceeding. See *Sullivan v. Louisiana*, 113 S.Ct. 2078. The due process clause entitles a person to an impartial and disinterested tribunal. Being subjected to biased proceedings is a due process violation *independent of the fines and sanctions that have already been imposed.*

Petitioners have established that there were structural errors, due process violations, and extrinsic fraud in the procurement of final judgments, in the State court proceedings. The State trial Judge's inexcusable failure to disqualify herself violated the Petitioners' Constitutional right to an impartial and disinterested tribunal and undermined public confidence in the Arizona

judicial process. *A person cannot be a judge of his or her own cause.*

Both the trial Judge and Division II Judges had a *nonwaivable* duty to disqualify themselves under the Canons of the Arizona Code of Judicial Conduct. The duty of a judge to disqualify himself or herself under *mandatory* disqualification statutes cannot be defeated by estoppel and cannot be waived. *Under the 3-part test*, the risk of injustice to the Petitioners, risk of injustice in other cases if relief is denied, and risk of undermining the public's confidence, are all far too great to deny vacatur of the final judgments in the State court proceedings, under Ariz. R. Civ. P. Rule 60 (c)(4).

Issue #2: The *rulings* and "*final judgments*" in the State court proceeding are void

Petitioners incorporate here by reference all of the arguments more fully argued above. The invalidity of the "*final judgment*" appears on the face of the record. The "*final judgments*" are wholly void because they were granted in contravention of Arizona's *mandatory* disqualification statutes, they were rendered by a court which lacked personal or subject matter jurisdiction, and they were rendered by a court which acted in a manner inconsistent with due process. Grounds of disqualification provided by statutes are *mandatory*, not waivable, and any judgment rendered by disqualified judge is void. See *Lyon v. State*, 764 S.W.2d 1.

The trial judge's violations of *mandatory* disqualification statutes deprived the trial court of subject matter jurisdiction to enter the Order of January 11, 2002, which dismissed Petitioners' retained legal counsel. No presumptions of "*good cause*" should be afforded to judges who *repeatedly* failed to comply with *mandatory* disqualification statutes. These disqualification statutes are meant to be self-enforcing, not issues to be addressed much later on appeal from "*final judgments*" after prejudice has worked it evil. Prejudice has most definitely

"*worked its evil*" and resulted in final judgments which are grossly unjust and from which Appellants' appeal has *quite predictably failed.* The failure to disqualify by the trial judge and Division II judges, resulted in loss of subject matter jurisdiction over the state court proceedings, and warrants vacatur of the final judgments.

The State trial judge has committed an egregious constitutional tort against the Petitioners, by dismissing *by fiat of the trial court* their retained legal counsel, and by *repeatedly* failing to comply with Arizona's *mandatory* disqualification statutes. These "*final judgments*" have substantially violated the public interest. Justice requires the appearance of justice. There was neither the appearance nor the existence of justice in the State court proceedings.

CONCLUSION

Wherefore, Petitioners respectfully pray that this Court issue writ of mandamus, vacate Final Judgments under Ariz. R. Civ. P. 60(c)(4) and declare the Final Judgments to be void, *or in the alternative,* compel the Arizona Supreme Court (or Division II or the Trial Court) to vacate Final Judgments under Rule 60(c)(4), declare the Final Judgments to be void, and to proceed no further in the State court proceedings. Petitioners further pray that this Court grant Petitioners such other and further relief, *including the imposition of sanctions,* as it may deem to be just and equitable.

APPENDIX

APPENDIX A: Order of Arizona Supreme Court on April 20, 2006, which denied Petition for Review, denied Motion to Expedite Petition for Review, denied Renewed Motion to Expedite Petition for Review, denied Motion to Vacate Final Judgments Under Rule 60(c)(4).....App. 1

APPENDIX B: Order of Division II Arizona Court of Appeals on September 8, 2005, which denied Motion for Reconsideration.....App. 2

APPENDIX C: Memorandum Decision of Division II on August 18, 2005, which affirmed the "*final judgments*" of the trial court.....App. 3-17

APPENDIX D: Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342).....App. 18-20

APPENDIX E: Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304).....App. 21-23

APPENDIX F: Second Amended Judgment (Nunc Pro Tunc) of March 23, 2005.....App. 24-25

APPENDIX G: Amended Judgment (Nunc Pro Tunc) of January 4, 2005.....App.26-27

APPENDIX H: Judgment of November 26, 2004, from Pima County Superior Court, Case No. C333954 .....App. 28-29

APPENDIX HH: Order of November 24, 2004, from Pima County Superior Court, Case No. C333954.....App.30-32

APPENDIX I: Order of November 9, 2004, from Pima Case No. C333954.....App. 33-35

APPENDIX J: Order of April 29, 2004, Pima County Superior Court, Case No. C333954.....App. 36-37

APPENDIX K: Davidsons' Motion to Amend Defendants' Answer, To Add Counterclaims, and Add Parties in C333954 dated February 26, 2004.....App. 38-40

APPENDIX L: Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ.....App. 41-46

APPENDIX M: Mandate of Arizona Court of Appeals of November 26, 2003, (#2 CA-CV 2002-0051).....App. 47

APPENDIX N: Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ.....App. 48-51

APPENDIX O: Plaintiffs' Original Complaint & Application for Injunctive Relief in U.S. District Court Case # CV-03-00580-FRZ, cover page and prayer for relief .....App. 52-53

APPENDIX P: Order, Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR.....App. 54

CITATIONS TO OPINIONS AND ORDERS

1. Orders, Arizona Supreme Court on April 20, 2006
2. Order, Division II on September 8, 2005
3. Memorandum Decision, Division II Arizona Court of Appeals on August 18, 2005
4. Memorandum Decision, April 4, 2005, from Ninth Circuit U.S. Court of Appeals (03-17342)
5. Memorandum Decision, April 4, 2005, from Ninth Circuit U.S. Court of Appeals (04-15304)
6. Second Amended Judgment nunc pro tunc, March 23, 2005, in Arizona trial court
7. Amended Judgment nunc pro tunc, January 4, 2005, in Arizona trial court
8. Judgment, November 26, 2004, in trial court
9. Order, November 24, 2004, in Arizona trial court
10. Order, November 9, 2004, in Arizona trial court
11. Order, April 29, 2004, in Arizona trial court
12. Mandate, Ninth Circuit: case is dismissed as to appellees Vivra Inc, Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY, U.S. District Court, Arizona District, Case No. CV-03-110-FRZ, Docket No. 61, on April 16, 2004
13. Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case No. CV-03-00580-FRZ
14. Mandate of Division II Arizona Court of Appeals of November 26, 2003 (2 CA-CV 2002-0051)
15. Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case No. CV-03-00110-FRZ
16. Order of Arizona Supreme Court re: action taken August 8, 2003 (CV-03-0148-PR)
17. Memorandum Decision of Division II Arizona Court of Appeals on February 27, 2003
18. Order of January 11, 2002, in Arizona trial court

JURISDICTION IN U.S. SUPREME COURT

This petition is filed under 28 U.S.C. § 1257, 28 U.S.C. § 1651(a), and Supreme Court Rule 20. Petitioners seek for mandamus to issue to review orders and opinions that are void *for lack of jurisdiction.*

RELIEF NOT AVAILABLE FROM ANY OTHER COURT

Petitioners are entitled to relief from the "*final judgments*" *as a matter of law.* Petitioners have been *denied* relief by the Arizona Supreme Court on April 20, 2006, *the highest state court from which relief could have been had.* There are obvious difficulties with the remedy of appeal after final judgment. Extrajudicial prejudice has most definitely "*worked its evil*" and the judgment of it in the Arizona Court of Appeals and Arizona Supreme Court is much worse than "*precarious*". See *Berger v. U.S.*, 41 S.Ct. 230. There are "*few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself [herself]*" See *Rosen v. Sugarman*, 357 F.2d 794, 797 (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION: Fourteenth Amendment: "*No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws*".

ARIZONA CONSTITUTION:

Article 2, Section 4: "*No person shall be deprived of life, liberty, or property without due process of law.*"

Article 6, Section 21: "*Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof.*"

ARIZONA RULES OF CIVIL PROCEDURE:

Ariz. R. Civ. P. 5.1: (see Appendix Z)
Ariz. R. Civ. P. 60 (c)(4): "On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: ...(4) the judgment is void; ..."
Ariz. R. Civ. P. 60(c)(6): "...any other reason justifying relief from the operation of the judgment."

RULES OF THE ARIZONA SUPREME COURT:

Rule 91(e): "*Every matter submitted for determination to a judge of the superior court for decision shall be determined and a ruling made not later than sixty days from submission thereof, in accordance with Section 21, Article VI of the Arizona Constitution.*"

ARIZONA CODE OF JUDICIAL CONDUCT:

Canon 3(B)(1): "*A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.*"
Canon 3(B)(8): "*A judge shall dispose of all judicial matters promptly, efficiently, and fairly.*"
Canon 3(E)(1)(a): "*A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.*"
Canon 3(E)(1)(c) states, in relevant part, "*the judge knows that he or she [...] has a financial interest in the*

subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the proceeding."
Canon 3(E)(1)(d)(iii) states, in relevant part, *"the judge [...] is known by the judge to have an interest that could be substantially affected by the proceeding."*

STATEMENT OF THE CASE

The filing of the State court proceeding (a defamation action) in an Arizona trial court in July of 1999, was a conscious attempt by the State court plaintiffs (Jay Grossman and Eudice Grossman) to avoid the very real possibility of a federal court ever reaching the issues surrounding their conduct in interstate commerce over the last two decades, in both Albany, NY and Tucson, AZ. Their *"attack the messenger"* strategy in this *"whistle blower"* action has been extraordinarily successful. In Arizona, the State court plaintiffs (Jay Grossman and Eudice Grossman) have triumphed in the midst of alleged adversity. For alleged *"losses"* in connection with the sale of Grossman's medical practice and the stock purchase and sale of Vivra stock, Grossman has been awarded damages against the Davidsons. By reason of Grossmans' violations of the substantive federal RICO statute, 18 U.S.C. § 1962(b), Grossmans have been awarded damages against Davidsons in a default judgment in the State court proceeding. *See Appendices F, G, H, and HH.* By reason of the concerted acts of the State Actors in the State Action, Davidsons have suffered *actual damages* and deprivation of constitutionally-protected fundamental rights.

The nucleus of operative fact upon which this case is based, centers primarily around the federal court defendants' (Jay Grossman, Eudice Grossman, *and others*) conduct in both Arizona and New York performing clinical research studies on behalf of various pharmaceutical corporate sponsors in support of New Drug Applications. The defendants in the

Federal court proceedings have by the very nature of their business (contract clinical research and specialty medical practice) willfully injected themselves, their business, and their conduct, into the stream of interstate commerce.

This is still a very "*live*" case and controversy.[1] Now that the Arizona Supreme Court has *finally* ruled, there are no "*ongoing state court proceedings*" to bar filing a federal RICO complaint. Davidsons' federal RICO claims have never been litigated. Davidsons request this Court to judicially notice the Supplemental Brief and Petition for Rehearing in U.S. Supreme Court Case No. 04-1687, as they are both material to issues (*mandatory* disqualification and state action) raised in the Petitions presently before this Court.

The "*final judgment*" in the State Court proceeding was a default judgment by a trial judge who failed to disqualify herself *on numerous occasions* under *mandatory* disqualification statutes of the Arizona Code of Judicial Conduct. The default judgment struck Davidsons' counterclaims (assault and battery *in the workplace*), granted Grossmans alleged damages of $7.8 million for alleged defamation and IIED, and entered sanctions against Davidsons, all without ever reaching the merits of the case or Davidsons' constitutional concerns regarding Ariz. R. Civ. P. Rule 5.1 and the Prescription Drug User Fee Act. It is quite clear from the record that both the State trial judge, Jane L. Eikleberry (referred to herein as "JLE") and the Federal District Court judge, Frank R. Zapata (referred to herein as "FRZ") violated *mandatory* disqualification statutes.

Michael J. Meehan (referred to herein as "MJM") was believed to have been an honorable, well-respected, practitioner of law in Tucson, Arizona when Davidsons

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[1]Davidsons were actually prevented from filing their federal Complaint with the U.S. District Court for Northern District of Texas (Case No. 3:06-CV-0920-M) until the Arizona Supreme Court ruled, so as to avoid *a second* dismissal under *Younger* abstention.

retained MJM as their legal counsel on October 13, 1999. Davidsons did not anticipate that MJM would abandon and slander his clients to achieve his judicial ambitions. *See Appendices Q through Z.*

The fact that the entire Arizona judicial system is seemingly in "*lock step*" on this matter should not deter this Court. This is an extraordinary case, imminently suitable for this Court's exercise of supervisory mandamus over a state trial court and state appellate courts. Petitioners have been denied a legal remedy by the Arizona judicial system for seven years due to "*structural errors*" in the State court proceedings *which were no fault of the Petitioners.*

Abbreviated Relevant Procedural History

Davidsons filed Emergency Motion to Stay the Proceedings on September 22, 2004, and Objection to Motion for Entry of Default and Sanctions on September 29, 2004. *Without jurisdiction to act* (in clear absence of all jurisdiction), the State trial court entered default (and sanctions) in Order of November 9, 2004, and "final" Judgment on November 26, 2004. Davidsons timely-filed Notice of Appeal with the trial court on December 8, 2004. *Without jurisdiction to act and without permission from Division II (Division II had jurisdiction, not the trial court),* Amended Judgment (nunc pro tunc) was entered on January 4, 2005, and Second Amended Judgment (nunc pro tunc) was entered by the trial court on March 23, 2005.

Davidsons filed "*Appellants' Expedited Motions: 1. Motion to include Second Amended Judgment (Nunc Pro Tunc) in record on appeal and 2. Motion for relief from "final" judgments under Ariz. R. Civ. P. 60(C)(6)*" with Division II on April 11, 2005. On April 27, 2005, Division II *denied* Appellants' Expedited Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(c)(6). Davidsons filed their *initial "Appellants' Motion to Reconsider"* on May 4, 2005. Division II *denied initial* Appellants' Motion to Reconsider on May 10, 2005.

On August 18, 2005, the Memorandum Decision of Division II *affirmed* the rulings and judgments of the trial court. Davidsons filed their *second "Appellants' Motion to Reconsider" with affidavit and exhibits,* on August 30, 2005. Division II *denied second* Appellants' Motion to Reconsider on September 8, 2005.[2] Petition for Review by Arizona Supreme Court *with affidavit and appendices,* was timely-filed on September 21, 2005, with Division II.

On April 20, 2006, *almost seven months after Davidsons filed Petition for Review,* the Arizona Supreme Court *denied* Petition for Review, *denied* Motion to Expedite Petition for Review, *denied* Motion to Vacate Final Judgments under Rule 60(c)(4), and *denied* Renewed Motion to Expedite Petition for Review.

Standard of Review

In the Seventh Circuit mandamus review of disqualification rulings is *de novo.* Appellate review of a judge's decision not to disqualify himself [herself] under *mandatory* disqualification statutes, should not be deferential. The Constitutional Due Process deprivation entailed by the trial judge's and Division II judges' *repeated* failures to disqualify themselves in the state court proceedings calls for application of the *de novo* standard of review. No presumptions of *"good cause"* should be afforded to judges who *repeatedly* fail to comply with *mandatory* disqualification statutes. There exist a class of constitutional errors that *"necessarily render a trial fundamentally unfair"* and these are not amenable to harmless error analysis. Harmless error analysis *"presupposes a trial, at which the defendant, represented by counsel, may present*

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[2]There were two entirely separate and distinct filings captioned *"Appellants' Motion to Reconsider"*, filed on May 4, 2005, and on August 30, 2005, *both of which were denied by Division II,* on May 11, 2005, and on September 8, 2005, respectively.

evidence and argument before an impartial judge and jury". The trial judge's and Division II judges' *repeated* failures to disqualify themselves denied Davidsons the "*basic trial process*" in the State court proceedings.

WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION

The Arizona Trial Court, Arizona Court of Appeals (referred to herein as "Division II"), and Arizona Supreme Court, need to be confined to a lawful exercise of their prescribed jurisdiction. Petitioners are victims of an *egregious judicial usurpation of power*.

The question of tribunal's jurisdiction was raised before Division II: (a) at paragraph 2, page 2, and paragraphs 1 and 2, page 3, of "*Appellants' Expedited Motions: 1. Motion to Include Second Amended Judgment Nunc Pro Tunc in Record on Appeal and 2. Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(C)(6)*" filed on April 11, 2005; (b) at paragraphs 2 and 3, page 2, and paragraphs 1-3, page 3, and pages 4-6, of "*Appellants' Reply to Appellees' Response to Appellants' Motion for Relief from Final Judgments under Ariz. R. Civ. P. 60(C)(6) and Appellants' Response to Appellees' Motion to Amend Record on Appeal*", filed on April 28, 2005; (c) at page 1 of *first* filing captioned "*Appellants' Motion to Reconsider*" filed on May 4, 2005; and (d) at pages 1-3 of *second* filing captioned "*Appellants' Motion to Reconsider*" *with affidavit and exhibits*, filed on August 30, 2005.

The question of tribunal's jurisdiction was raised before Arizona Supreme Court: (a) at pages 1-3 and paragraph 3 at page 9 of Petition for Review *with affidavit and exhibits*, filed on September 21, 2005; (b) at pages 4, 5, 8, and 10-18, of "*Motion to Vacate Final Judgments under Rule 60(C)(4)*" *with affidavit and exhibits*, filed on or about February 20, 2006; and (c) in "*Renewed Motion to Expedite Petition for Review*", *with affidavit and exhibits*, filed on March 24, 2006.

Violations of *Mandatory* Disqualification Statutes

The trial judge had disqualifying knowledge (*actual knowledge of her direct personal interest in the outcome of the litigation and personal extrajudicially-acquired knowledge of disputed evidentiary facts concerning the proceeding*) at the time she entered the Order of November 9, 2004, which entered default and sanctions against Davidsons, and struck their counterclaims. The trial judge had disqualifying knowledge at the time she entered the Order of April 29, 2004, which denied Petitioners' Motion to Amend Answer to Add Counterclaims, and Add Parties. The trial judge had disqualifying knowledge at the time she entered the Order of January 11, 2002, which dismissed Petitioners' retained counsel of record.

A reasonable person, *knowing all the facts*, would have reasons to seriously doubt that the trial judge was impartial towards the Petitioners in a proceeding in which she ordered a *default* judgment against them for $7.8 million, after stripping them of their retained counsel of record *by fiat of the trial court*, and after denying them the right to argue and prove *pattern* of misconduct and *conspiracy* in the State court proceeding. Appendices I, J, and V, should be read in the context from which they arose. *See Appendices Q through Z.*

Constitutional Due Process and Equal Protection Deprivation under the 14th Amendment

Petitioners have been deprived of fundamental rights to due process, equal protection, and the *presently-enjoyed* benefit (liberty and property interest) of retained legal counsel, by *invidiously discriminatory* applications of the Arizona Canons of Judicial Conduct and the Arizona Rules of Civil Procedure Rule 5.1 to the Davidsons. In this case the Arizona judicial system has set a *new standard* for the non-disqualification of

judges, which is violative of the 14th Amendment of the U. S. Constitution.

Withdrawal of counsel and failure to comply with *mandatory* disqualification statutes by the State trial judge and appellate judges in the state court proceedings, deprived Davidsons of 14th Amendment Due Process and Equal Protection. These Judges *all* knew that Thomas A. Zlaket's term as Chief Justice was due to expire at midnight on Monday, January 7, 2002. *See Appendix W.* The State trial Judge had *actual* knowledge of MJM's judicial ambitions *prior* to her Order of January 11, 2002, which dismissed Davidsons' retained counsel of record. These Judges *all* knew that a lawyer (MJM) and law firm (QBSL) who maliciously abandon and slander their clients, for personal political and financial gain, under color of law, acting in concert with the trial judge and opposing legal counsel, represents an exception to the doctrine of judicial immunity. These Judges *all* knew that the State trial judge *and others* were named as State Actors in the State court proceedings.

The trial judge and named Division II Judges and Supreme Court Justices, had personal, extrajudicially-acquired knowledge that the Motion to Withdraw as Counsel of Record was a willful, malicious violation of Davidsons' civil rights, motivated by bad faith (evil intent), an improper motive (personal political and financial gain), and with deliberate reckless indifference to the federally-protected rights of the Davidsons.

Davidsons request that this Court judicially notice Canon 3(B)(8) of the Arizona Code of Judicial Conduct, Rule 91(e) of the Rules of the Arizona Supreme Court, and Article VI, Section 21 of the Arizona Constitution, *found at pages 2 and 3 of this Petition.* It is unconscionable *(sanctionable)* that Division II and the Arizona Supreme Court simply sat on the Petition for Review *for nearly seven months* without a final ruling. *This unreasonable delay in making their final ruling deprived Davidsons of due process and equal protection.* There is no justifiable reason for such a delay. By

reason of this *invidiously discriminatory* delay, Arizona Supreme Court has caused direct injury (*actual damages*) to Davidsons. Malice by Arizona Supreme Court towards Davidsons can be inferred.

A reasonable person, *knowing all of the facts*, would have reasons to seriously doubt the ability of the Arizona Commission on Judicial Conduct to conduct an unbiased factual inquiry into the circumstances for the "*delay*" in this matter, after learning that Judge J. William Brammer, Jr., chairman of the Commission conducting such an inquiry, had been named as a State Actor in the State Action. Division II Judge J. William Brammer wrote the Memorandum Decision of August 18, 2005, which affirmed the rulings of the trial court. *See Appendices C and T.*

Disqualifying Extrajudicial Knowledge

Davidsons learned in August 2005, that their former counsel of record, MJM, was candidate for several vacancies on the bench of Division II and Arizona Supreme Court from 2002 to 2003, during the time when interlocutory appeal and petition for review were before the Arizona appellate courts. *See the Affidavit and Exhibits 1 through 14 of Appellants' Motion to Reconsider to Division II file-stamped on August 30, 2005.*

The trial judge's *actual knowledge* of MJM's candidacy for several appellate court vacancies on the Arizona bench from 2002 to 2003, while interlocutory appeal (to Division II and Arizona Supreme Court) was pending, and prior to "*final Judgment*" in the State court proceeding, gives rise to estoppel as a matter of law. See *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194. *The State trial Judge had actual knowledge of MJM's judicial ambitions prior to her Order of January 11, 2002, which dismissed Davidsons' retained counsel of record. Both MJM and the State trial judge (JLE) knew that Thomas A. Zlaket's term as Chief Justice was due to expire at midnight on Monday, January 7, 2002. See Appendix W.*

The State trial Judge was incapable of "*holding the balance true*" between Davidsons' rights and MJM's rights, when she had *actual knowledge* of MJM's judicial ambitions and candidacy for the Arizona bench. The State trial Judge's rulings favored MJM's judicial ambitions and MJM's subsequent candidacy at the expense of Davidsons' right to a fair trial. The State trial Judge's extrajudicially-acquired, personal bias represents *structural error* in the constitution of the trial process.

The trial judge was named as a State Actor in *both* of two prior Petitions for Writ of Certiorari. See U.S. Supreme Court docket # 04-537, filed on September 17, 2004, and U.S. Supreme Court docket # 04-1687, filed on June 13, 2005. State trial Judge JLE had *actual knowledge* of her joint and several liability (*direct pecuniary interest*) to the Davidsons for $15MM in compensatory and $60MM in punitive damages, *prior* to the Order of November 9, 2004. The State trial Judge had *actual knowledge* of Document #93 Index of Record ("Motion to Amend Defendants' Answer, to Add Counterclaims, and Add Parties", filed on or about February 26, 2004). *See Appendix K at App. 40* where it states,

> "*Under the Uniform Contribution Among Tortfeasors Act, joint and several liability is preserved for true joint tortfeasors, including those "acting in concert" and those who are vicariously liable for the fault of others.*"

State trial Judge had *actual knowledge* of interlocutory Appeal to Division II. See pages 2 and 6 of Reply Brief in 2 CA-CV 2002-0051 to Division II. State trial Judge had *actual knowledge* of the federal court proceedings against MJM and QBSL. Davidsons request this Court to judicially notice Page 20 of "Plaintiffs' Original Complaint & Application for Injunctive Relief", the prayer for compensatory and punitive damages and signature page from U.S. District Court Case No. 03-CV-00580-FRZ, filed on

November 20, 2003, where it states, "*Enter judgment for plaintiffs and award the plaintiffs $15MM in compensatory and $60MM in punitive damages, against the defendants and each of them and in favor of the plaintiffs.*" *See Appendix O at App. 53.* See page 30 (Issue #4) of Petition for Writ of Certiorari before Judgment (U.S. Supreme Court docket # 04-537).

It is beyond dispute that the State trial judge JLE was disqualified by *actual knowledge* of her personal interest in the outcome of the litigation, which is direct, certain, and immediate. Only one inference can reasonably be drawn from the evidence. Estoppel may be a question of law, when the facts are not in dispute or are beyond dispute. *See 28 Am. Jur. 2d Estoppel and Waiver Section 188. See Appendix I at App. 34.*

The Order of April 29, 2004, is void. The Order of November 9, 2004, is void, and has retroactive application to earlier rulings. See *Appendices I and J. The trial judge's mandatory disqualification is jurisdictional and cannot be waived by the parties.* Arizona Supreme Court should have granted Motion to Vacate "Final" Judgments under Rule 60(C)(4) *as a matter of law.* This Court has the power to exercise its extraordinary remedy of supervisory mandamus to right the injustice of the Arizona Supreme Court's *denial* of Motion to Vacate. *It is very much in the public's interest that no man (or woman) should be judge over himself (herself).*

The trial judge's *repeated* violations of *mandatory* disqualification statutes deprived the trial court of subject matter jurisdiction to enter the Order of January 11, 2002, which dismissed Davidsons' retained legal counsel. *Where a disqualification statute also provides that a judge must not sit in a case in which he or she is disqualified, the disqualification is generally held to be jurisdictional and cannot be waived by the parties.* See *Pahl v. Whitt* 304 SW.2d 250.

If two federal U.S. District Court judges [the Honorable John M. Roll and the Honorable David C. Bury] had a <u>non-discretionary</u> duty to disqualify

themselves when 28 U.S.C. § 455(b)(1) applied, the State court judges [including trial Judge JLE and certain named Division II Judges] had a comparable *non-discretionary* duty as a matter of law to disqualify themselves when Canon 3(E)(1)(a) applied. For evidence of the federal judges' disqualification, see the PACER docket entries for CV-03-580-FRZ (*Davidson v. Meehan*).

Memorandum Decisions of Division II

See the Memorandum Decision of Division II (Appendix R, ¶ 4 at App. 57) where it states,

> *"Although we might agree that the rights to which Davidson refers are substantial, we cannot agree that the trial court's order permitting his counsel to withdraw determined the action that the Grossmans filed against him. That "order did not finally dispose of the case, leaving no question open for judicial determination." Eaton v. Unified Sch. Distr. No. 1 of Pima County, 122 Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979). The order simply allowed Davidson's attorney to withdraw his representation and continued the date for a trial on the merits."*

This Court should read *both* of Division II's opinions, found as *Appendices C and R* (quoted in part, above), from the perspective of the facts found in *Appendices Q through Z*. Division II Judges J. William Brammer and John Pelander interviewed on May 10, 2002, with MJM for the same Supreme Court vacancy created by the retirement of Justice Thomas A. Zlaket. MJM and Division II Judge John Pelander were both candidates in November 2002, for the opening created on the Arizona Supreme Court bench by the anticipated retirement of Justice Stanley Feldman. MJM was one of 10 applicants (including Peter J.

Eckerstrom) in March 28, 2003, for the opening on Division II created by the retirement of Division II Judge William E. Druke. Judge William E. Druke retired on February 28, 2003, just one day after the Memorandum Decision (by William E. Druke, with Philip G. Espinosa and John Pelander, concurring) which dismissed interlocutory appeal (2CA-CV 2002-0051). Division II Judge J. William Brammer wrote the Memorandum Decision (with Peter J. Eckerstrom and M. Jan Florez, concurring) of August 18, 2003, which affirmed the rulings and judgments of the trial court.

A reasonable person, *knowing all of the facts*, would have reasons to seriously doubt the ability of the Arizona Commission on Judicial Conduct to conduct an unbiased factual inquiry into the circumstances surrounding alleged *mandatory* judicial disqualifications, after learning that Judge J. William Brammer, Jr., chairman of the Commission conducting such an inquiry, had been named as a State Actor in the State Action.

The Memorandum Decision of Division II has relied upon the Grossmans' rendition of the factual and procedural background of this case. *See App. 4, footnote 1, of Appendix C.* Please also note the *footnote 3 at App. 5*, wherein Division II Judge Brammer dismisses the interlocutory appeal as a "*procedural impropriety*". Judge Brammer knew that there was not "*good cause appearing therefore*" to justify MJM's malicious abandonment and slander of his clients. Judge Brammer does an efficient [*albeit specious*] job of quoting Grossmans' counsel of record (Bruce R. Heurlin) wherein he cites "*Davidsons' [alleged] failure to participate ... and repeated attempts to delay the proceedings and to harass the Grossmans with frivolous filings.*" *See App. 6, ¶ 6.*

Footnote 4 at App. 7 of Appendix C is very misleading and needs clarification. *Davidsons' filing of two additional Notices of Appeal was necessitated by Grossmans' filing of two Amended Judgments, both nunc pro tunc, and* <u>*both Amended Judgments were*</u>

entered without permission from Division II (Division II had jurisdiction, not the trial court). Davidsons were of the belief at the time that because of the trial judge's repeated refusals to take jurisdiction over their Motions to Vacate the Judgments, that the subsequent *"final (amended twice) judgments"* had to also be appealed, to preserve their right to appeal.

Davidsons submitted (*pro se*) a Notice of Appeal (*see Appendices VV-VVVV*) with the trial court on February 11, 2002, from East Texas, after having relocated *about 1200 miles*, to take new employment. Contrary to the impression given by Judge Brammer at App. 7-9, ¶ 10-12, *Davidsons never waived their right to appeal the Motion to Withdraw as Counsel of Record and the Order granting withdrawal, either expressly or by their conduct. Waiver is one of the reasons given by Division II for not reaching the constitutionality of Arizona Rule 5.1 and the issue of State Action. See Petition for Review to Arizona Supreme Court at pages 4 through 6, which specifically address the question of waiver.*

Judge Brammer is quite correct in his footnote 7 at App. 9 of the Memorandum Decision, where he states, *"The Davidsons also contend Meehan, his law firm, the Grossmans, and the trial judge 'conspired with each other, as State Actors,' to deprive them of their constitutionally-protected property interest in retained legal counsel."* However, Judge Brammer is quite incorrect where he states, *"Because this contention is unsupported by any legal authority, we do not address it."*

The aforementioned false assertion (alleged lack of authoritative legal support) by Division II is one of the reasons given by Division II for not reaching the constitutionality of Arizona Rule 5.1 and the issue of State Action. Both of these issues were properly raised before Division II. Davidsons refer this Court to the Opening Brief and Reply Brief in 2CA-CV 2005-0011 and to Appellants' Motion to Reconsider to Division II on August 30, 2005. *Division II's allegation of waiver*

(at App. 7-9) and false assertion of lack of legal authority (at footnote 7, App. 9) are the sole bases given for not reaching the federal questions raised by Davidsons in the State court proceedings. There is no adequate state law basis for not reaching the federal questions raised by the Davidsons in the State court proceedings.

See page 14 of the Reply Brief to Division II, where it states, "*Liability may attach to MJM and QBSL and the Trial Judge under 42 USC Section 1983, 42 USC Section 1985, and 42 USC Section 1988, because the acts complained of were done outside the scope of their duty. See Carruth v. Geddes, 443 F.Supp. 1295.*" Davidsons cited 42 U.S.C. § 1983 and § 1985, on numerous occasions on Appeal to Division II. *See Issues #1, 2, and 3 of the Opening Brief to Division II in 2CA-CV 2005-0011. This Court is especially referred to Issues #1 and #2 of the Reply Brief to Division II where twelve authorities and statutes are cited, including 42 U.S.C. § 1983, § 1985, § 1988, and the Due Process clause of the 14th Amendment.*

The arguments put forward by Judge Brammer in ¶ 18-22, App. 12-14 of Appendix C, are *all based on an abuse of discretion standard of review.* Davidsons did not learn of the disqualifying predicate facts until August 2005. *The State Actors, however, knew of the disqualifying facts (extrajudicial personal knowledge), for more than four years.* Davidsons immediately brought the disqualifying facts to the attention of Division II in Appellants' Motion to Reconsider on August 30, 2005, *with affidavit and exhibits.* It is unconscionable *(sanctionable)* for Division II and Arizona Supreme Court to deny the reality of their disqualifying extrajudicial knowledge. *De novo* review of their repeated denials of Davidsons' *multiple* motions for vacatur (under Ariz. R. Civ. P. 60(c)(6) and 60(c)(4) is clearly warranted. Davidsons have overcome the presumption of impartiality of the State court adjudicators by demonstrating the existence of circumstances indicating a probability of bias too high

to be constitutionally tolerable. See *McIlwain v. U.S., 104 S.Ct. 409.*

Judge Brammer's argument at ¶ 22 and ¶ 23 of Appendix C (App. 14 and 15) is *totally bogus. The trial court entered default and sanctions against Davidsons because of actual knowledge of her direct personal interest which could have been substantially affected by the proceeding.* The arguments put forward by Division II in ¶ 24 are completely self-serving, argued in bad faith, and *warrant sanctions by this Court.* See ¶ 26 at App. 16 where it states, *"We reject the Davidsons' assertion of bias."* Division II has been disqualified for more than four years. The extrajudicial prejudice which infected the State court proceedings has had a *"very long time to work its evil"*. A reasonable person, *knowing all the facts,* would have reasons to seriously doubt the impartiality of Division II.

Of course, Judge Brammer makes no mention of the great prejudice to the Davidsons in failing to disqualify themselves and the great prejudice to the Davidsons in the motion to withdraw as counsel and the coerced dismissal of Davidsons' retained counsel of record *by fiat of the trial court.* Nor does the Arizona Supreme Court provide any explanation for their *inexcusable seven month delay in ruling* on Petition for Review.

Motions to vacate under Ariz. R. Civ. P. 60(c)(4) and Ariz. R. Civ. P. 60(c)(6) can be made any time in the proceedings, even on appeal from final judgment. *See Appendix A. See pages 3 through 9 of Appellants' Expedited Motions dated April 8, 2005, to Division II. See pages 1 through 4 of Appellants' Motion to Reconsider with affidavit and exhibits, filed-stamped on August 30, 2005. See Issue #6 of Opening Brief to Division II. See pages 1 through 3 of Petition for Review to Arizona Supreme Court.* On *numerous* occasions the trial court refused to rule on Davidsons' Motions to Vacate judgments, claiming lack of jurisdiction, untimeliness, or both.

Arizona's procedural rules were not a sufficient basis upon which to deny review, either on interlocutory appeal or on appeal from final judgment, of Davidsons' constitutional issues in the State court proceedings. *See paragraph 3, page 4, and paragraphs 1-3, page 6, of Petition for Review to Arizona Supreme Court.* The Order of January 11, 2002, was the Order appealed from in interlocutory appeal to Division II (2CA-CV 2002-0051) and passed on by Division II in the Memorandum Decision of February 27, 2003. *See Appendix R.* While Division II "*might agree*" that *fundamental rights* were involved, they alleged that state procedural rules precluded their needing to reach the federal constitutionality of Arizona Rule 5.1.

In retrospect, it is quite foreseeable that the State Actors would be unable to judge themselves fairly. "*A person cannot be a judge of his or her own cause.*" See *Smith v. Smith, 115 Ariz. 299.* This is both a matter of *public policy* and a matter of law. The trial judge's and Division II judges' failures to disqualify themselves under Arizona's *mandatory* disqualification statutes is jurisdictional and cannot be waived.

Rulings and "*final judgments*" are void

The trial judge's Orders of January 11, 2002, April 29, 2004, and November 9, 2004, were improperly reviewed by Division II, *when they had no jurisdiction or power to consider these matters. Davidsons did not learn of the existence of disqualifying facts until August of 2005.* Division II's *denial* of Appellants' Motion to Reconsider, submitted on August 30, 2005, is void. Division II's affirmation of the trial court is void because the rulings and judgments of the trial court are

void.[3] *See Petition for Writ of Certiorari which accompanies this Petition.* Division II's affirmation is also void because the Division II Judges who rendered the Memorandum Decision of February 27, 2003, and the Memorandum Decision of August 18, 2005, are disqualified by *actual knowledge of their personal interest in the outcome of the litigation, personal extrajudicially-acquired knowledge of disputed evidentiary facts concerning the proceeding*, and *appearance of partiality.*

Davidsons request this Court to judicially notice the Canons of the Arizona Code of Judicial Conduct, *found at pages 3 and 4 of this Petition.* Canon 3(B)(1) states, "*A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.*" Under state law, if a judge is disqualified, that disqualification strips the court of subject matter jurisdiction. See *Ellentuck v. Klein*, 570 F.2d 414 (2nd Cir 1978). If the disqualification is of a nature that cannot be waived, or is considered as founded in public policy, the act of a disqualified judge is absolutely void. This is also true where the constitution or statute creating the disqualification by *mandatory* provision prohibits the judge from acting. See *C.J.S. Judges Section 323.*

EXCEPTIONAL CIRCUMSTANCES WARRANT EXERCISE OF COURT'S DISCRETIONARY POWERS

Petitioners have established that they have a *clear right to the requested relief.* Respondents owed a clear nondiscretionary duty. Petitioners have *exhausted all other avenues of relief and review by other means is not*

[3] If this Court holds that the trial judge's Order of January 11, 2002, is void, Davidsons have still sustained legally-cognizable constitutional injury under color of Arizona Rule 5.1 *(see Appendix Z)* because of the immediate injury to the Davidsons in the "*gap interval*" caused by the Motion to Withdraw. Davidsons' assertion that Ariz. R. Civ. P. Rule 5.1 is repugnant to the U.S. Constitution is, therefore, not made moot by the trial judge's failure to disqualify herself.

possible. An extraordinary remedy by this Court is called for because *this is a truly extraordinary cause. There are exceptional circumstances in this case amounting to a judicial usurpation of power.*

Manifest Abuse of Authority

"*Final judgments*" (Judgment, Amended Judgment Nunc Pro Tunc, and Second Amended Judgment Nunc Pro Tunc) have been rendered by the Arizona trial court. *The subject matter of the "final judgments" was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority.* Mandamus is proper in egregious jurisdictional violations such as that found in C333954.

Public policies favoring finality over validity of judgments presuppose that fair opportunity is available to contest subject matter jurisdiction in the court whose jurisdiction is in question. Davidsons' challenge to the subject matter jurisdiction following a default judgment was *never litigated by any state court.* Davidsons were denied the opportunity to litigate the question of jurisdiction by *exceptional circumstances.* Davidsons never had their day on the merits, even if before a body whose authority is in doubt. The public interest would be well served by granting mandamus because *the tribunal's excess of authority was plain* and has *infringed a fundamental constitutional protection.* See *Restatement (Second) of Judgments, Section 12.*

Petitioners have *a clear right* to relief

The setting aside of judgment in equity on showing of extrinsic fraud is permitted because such fraud corrupts judicial power and serves to turn court of law into instrument of injustice. See *Southeastern Colorado Water Conservancy Dist. v. Cache Creek Min. Trust*, 854 P.2d 167. To constitute fraud on court justifying relief from judgment, conduct must be so egregious that it involves corruption of judicial process. See *Village of Chefornak v.*

Hooper Bay Const. Co., 758 P.2d 1266. *The State court proceeding corrupted judicial power and turned a court of law into an instrument of injustice. The State court proceeding involved conduct by the State Actors which was so egregious that it corrupted the judicial process.*

If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under statute to the injured party. See *In re Estate of West*, 415 N.W.2d 769. *The predicate facts in the State court proceeding establish that Davidsons' lawyer (MJM) colluded with his law firm (QBSL), Bruce R. Heurlin (Grossmans' retained counsel), the trial judge (JLE), and others, in a material and factual misrepresentation which constituted an intentional fraud or deceit and resulted in a judgment adverse to the interests of the Davidsons. Acting by agreement and in concert,* the Arizona courts have *serially* denied Davidsons' motions for relief from the "*final judgments*", the most recent denial being the Arizona Supreme Court ruling on April 20, 2006. *See Appendix A.*

The right of a court to vacate or modify judgment is not limited to showing that it was procured by actual fraud, collusion, and misrepresentation, but *it is sufficient if there is a showing that the rights of interested parties are prejudicially affected by the judgment and if there was inadvertently a withholding from the court of matters which should have been properly before it,* but for which withholding the judgment would not have been rendered. See *Pengelly v. Thomas*, 65 N.E.2d 897. For the purposes of an action to annul a judgment, *conduct which prevents an opposing party from having an opportunity to appeal or to assert a defense constitutes a deprivation of legal rights.* See *Clulee v. Louisiana Materials Co., Inc.*, 590 So.2d 780.

Davidsons' rights were prejudicially affected by the unreasonably delayed "final judgments" of the Arizona Supreme Court and that there was a willful, malicious,

withholding from the court of matters which should have been properly before it, which prevented the Davidsons from having an opportunity to appeal from "final judgments" of the Arizona Supreme Court to the U.S. Supreme Court.

Extrinsic Fraud in Procurement of Judgment

Davidsons were prevented from having a fair trial of the real issues by reason of the fraudulent contrivance of his adversaries. See *C.J.S. Judgments Section 309. "The fraud that vitiates a judgment is a fraud which goes to its procurement."* See *Mekelburg v. Whitman*, 545 S.W.2d 89. "*Extrinsic fraud*", such as will justify relief from judgment procured thereby, is collateral conduct unrelated to fact finder's decision, such as conduct that keeps party in ignorance of action, false offers of compromise, attorney's betrayal of client's interest to adversary, and other acts of similar nature. See *JRD Development Joint Venture v. Catlin*, 840 P.2d 737.

The State court proceeding is distinguished from *JRD Development Joint Venture v. Catlin* in that the "*collateral conduct*" in C333954 was directly related to the trial judge's (fact finder's) decisions, because the trial judge was a *joint participant* in the corrupt conspiracy (the State Action) to defraud the whistle blower (the Davidsons) and deprive Davidsons of constitutional rights. JLE had *actual knowledge* that there was not "*good cause appearing therefore*" upon which to base the Order of January 11, 2002. So too did certain named Division II Judges and Arizona Supreme Court Justices[4] have personal, extrajudicially acquired knowledge of disputed evidentiary facts concerning Davidsons' attorney (MJM).

4Two *current* sitting Arizona Supreme Court Justices, Michael D. Ryan and Andrew D. Hurwitz, were interviewed on May 10, 2002, along with MJM, for the Supreme Court vacancy created by the retirement of Justice Thomas A. Zlaket. Two *current* sitting Arizona Supreme Court Justices, Andrew D. Hurwitz and W. Scott Bales, were candidates in December 2002, along with MJM for the Supreme Court vacancy created by the retirement of Justice Stanley Feldman. *See Appendices P through Z.*

These judges had *actual knowledge* that MJM's and QBSL's Motion to Withdraw was in no way motivated by "*good cause*". To the contrary, *the trial judge and named Division II Judges and Supreme Court Justices, had personal, extrajudicially-acquired knowledge that the Motion to Withdraw as Counsel of Record was a willful, malicious violation of Davidsons' civil rights, motivated by bad faith (evil intent), an improper motive (personal political and financial gain), and with deliberate reckless indifference to the federally-protected rights of the Davidsons.*

See Petition for Writ of Certiorari before Judgment (U.S. Supreme Court docket # 04-537) at page 29 where it states,

> *"By information and belief, Q&BSL and MJM knew the substance and content of the "Prosecution Memorandum" before they filed their Motion to Withdraw as counsel of record in the State court proceeding. Yet, Q&BSL and MJM agreed [with each other] to continue to refuse to bring Arizona fraud, Arizona RICO, and federal RICO actions, on behalf of their then clients, the Davidsons, despite repeated requests by the Davidsons to bring such actions."*

Davidsons did not realize at the time that the object of the aforementioned *repeated* refusals to bring fraud and racketeering actions on behalf of their clients, and the object of their Motion to Withdraw, was not solely to permanently deprive the Davidsons of a legal remedy for the injuries wrought upon them by the Grossmans and others acting in concert, and avoid their contractual and professional responsibility to the Davidsons, just four months before the scheduled trial date, but was also intended to conceal the racketeering conspiracy which had been ongoing for nearly two decades, in both New York and Arizona, and facilitate MJM's candidacy for anticipated vacancies in the Arizona Supreme Court and Division II.

Hidden facts indicating partiality may at any time come into public view and therefore are legitimate elements of an appearance test. See *Idaho v. Freeman*, 507 F. Supp. 706 (1981). Predicate facts establish that MJM and QBSL were not acting within the scope of their duties as Davidsons' retained legal counsel (*they were not performing professional acts*) when they abandoned their clients in their Motion to Withdraw as Counsel of Record on December 17, 2001. As soon as the *initial* predicate facts became known to the Davidsons (August 2005), they sought to make them part of the record in the State court proceedings. *Predicate facts are found: (a) as Exhibits to Appellants' Motion to Reconsider filed on August 30, 2005, with Division II, (b) as Exhibits to Petition for Review on September 21, 2005, to Arizona Supreme Court, (c) as Exhibits to Motion to Vacate "Final" Judgments under Rule 60(c)(4) filed on February 21, 2006, with Arizona Supreme Court, (d) as Exhibits to Renewed Motion to Expedite Petition for Review filed on March 24, 2006, with Arizona Supreme Court, and (e) as Appendices to Reply Brief to Division II in 2CA-CV 2005-0011.*

The trial judge admitted to having read Davidsons' first Petition for Writ of Certiorari (*filed with this Court on September 17, 2004*) in the Order of November 9, 2004. The trial judge, therefore, admitted to having actual knowledge of her *"financial interest in the subject matter in controversy [...] or any other interest that could be substantially affected by the proceeding"*. The Order of November 9, 2004, therefore, represents an actual admission of having *knowingly* violated Arizona's *mandatory* disqualification statutes. Davidsons are entitled to relief from "*final judgments*" as a matter of law. The invalidity of the "*final Judgment*" appears on the face of the record. *See Appendix I at App. 34.*

A judge *must* disqualify himself or herself if he or she is a party to the lawsuit, or otherwise has any direct interest in the outcome of the litigation. There are no provisions for exceptions or waivers to this principle. It is fundamental to due process that no one may judge his [her] own case, and therefore any judge who is named a

direct party to the litigation *must step aside. Both of Davidsons' petitions for writ of certiorari named the State trial judge as a State Actor in the State Action.* Davidsons request this Court to judicially notice both petitions for writ of certiorari (U.S. Supreme Court docket # 04-537, filed September 17, 2004, and docket # 04-1687, filed June 13, 2005) where Davidsons allege State Action by State Actors *acting in concert* in the State court proceedings. It is indisputably and incontrovertibly true and "*a matter of common knowledge*" that State trial judge was named as a State Actor in the State Action. See *Am. Jur. Evidence Section 31.* See Issue #1 (at pages 9-16) and Issue #4 (at pages 25-30) in Petition for Writ of Certiorari before Judgment to the U.S. Supreme Court (docket # 04-537). See Issue #2 (at pages 8 through 15) in Petition for Writ of Certiorari to the U.S. Supreme Court (docket #04-1687). See Issue #5 (at pages 31-35) of Opening Brief to 2 CA-CV 2005-0011.

Davidsons have established *actual bias* by the State trial Judge in the State court proceedings. This Judge failed to disqualify herself *repeatedly* and made numerous rulings (including the Order of January 11, 2002, Order of April 29, 2004, and Order of November 9, 2004) and Judgments in the proceeding which called for discretion. Her *personal bias* in favor of MJM and QBSL, based upon her *direct personal interest* in rulings favorable to the State Actors, resulted in numerous rulings and Judgments in the State Action which had direct and substantial deleterious impact upon the Davidsons. The *personal bias* and prejudice demonstrated was of such a character as would disqualify the judge *by reason of public policy.* The state trial Judge's proclivities were *indisputably* prejudicial to the Davidsons.

The reasonable person standard applies to Arizona Code of Judicial Conduct, Canon 3(E)(1). "*The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact*". The predicate facts provide personal circumstances where the trial judge and certain named Division II appellate judges' impartiality might reasonably be

questioned. The predicate facts provide an extrajudicial source of evidence from which a reasonable person can apprehend personal bias or prejudice by the trial judge and by certain named Division II appellate judges against the Davidsons and in favor of MJM, QBSL, the trial judge, and certain named Division II appellate judges. Davidsons have met their burden of alleging and proving facts which create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.

Issue #1: Petitioners are entitled to vacatur of the "*final judgments*" as a matter of law

Petitioners incorporate here by reference all of the arguments more fully argued above. The fact that a judgment was obtained through fraud or collusion is generally held to constitute a sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered. Petitioners allege extrinsic fraud and collusion in the procurement of final judgments, resulting in a continuing constitutional tort by the State Actors in the State Action upon the Petitioners. Petitioners allege a corrupt conspiracy which employed fraud *by the court* upon the Petitioners in the State court proceeding.

The inexcusable seven month delay by Division II and Arizona Supreme Court in entering final judgment represents a willful denial of due process and equal protection in the State court proceedings. By reason of the delay, Petitioners have suffered irreparable injury. Malice may be presumed from the predicate facts. If there are intervening interests of reliance on the "*final judgments*", Petitioners' challenge to subject matter jurisdiction, should still be permitted because Petitioners were deprived of due process by this unreasonable delay. Ill practice justifies annulment of a judgment even though no actual fraud or intentional wrong is shown. See *Washington v. Lee Tractor Co., Inc.*, App. 5 Cir., 526 So.2d 447.

Statutes disqualifying judges on the ground of interest are absolute, *mandatory*, and jurisdictional. They will be liberally construed. See *State v. Thomas*, 99 Fla. 562, 126 So. 747 (1930). It is beyond the scope of legislative authority to confer on a party to a controversy or one interested therein, the power to act as judge in such cause. See *48 C.J.S. Judges Section 267.* Petitioners have established, by clear and convincing evidence, that the State trial judge was disqualified on the ground of interest. The State trial judge violated her duty to disqualify herself when Canons 3(B)(1), 3(E)(1), 3(E)(1)(a), 3(E)(1)(c), and 3(E)(1)(d)(iii) of the Arizona Code of Judicial Conduct applied.

"*Structural errors*" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards *and require reversal.* See *State v. Dorsey*, 701 N.W.2d 238. The State trial judge's extrajudicially-acquired, personal bias represents structural error in the constitution of the trial process. The State trial judge's coerced dismissal *by fiat of the trial court* of Petitioners' retained counsel of record, violates due process and amounts to structural error, and this cannot be harmless error regardless. This constitutional "*error*" had a profound prejudicial impact on the outcome of the Petitioners' case. Both the denial of counsel and judicial bias were structural errors which affected the composition of the record in the State court proceeding. See *Sullivan v. Louisiana*, 113 S.Ct. 2078. The due process clause entitles a person to an impartial and disinterested tribunal. Being subjected to biased proceedings is a due process violation *independent of the fines and sanctions that have already been imposed.*

Petitioners have established that there were structural errors, due process violations, and extrinsic fraud in the procurement of final judgments, in the State court proceedings. The State trial Judge's inexcusable failure to disqualify herself violated the Petitioners' Constitutional right to an impartial and disinterested tribunal and undermined public confidence in the Arizona

judicial process. *A person cannot be a judge of his or her own cause.*

Both the trial Judge and Division II Judges had a *nonwaivable* duty to disqualify themselves under the Canons of the Arizona Code of Judicial Conduct. The duty of a judge to disqualify himself or herself under *mandatory* disqualification statutes cannot be defeated by estoppel and cannot be waived. *Under the 3-part test*, the risk of injustice to the Petitioners, risk of injustice in other cases if relief is denied, and risk of undermining the public's confidence, are all far too great to deny vacatur of the final judgments in the State court proceedings, under Ariz. R. Civ. P. Rule 60 (c)(4).

Issue #2: The *rulings* and "*final judgments*" in the State court proceeding are void

Petitioners incorporate here by reference all of the arguments more fully argued above. The invalidity of the "*final judgment*" appears on the face of the record. The "*final judgments*" are wholly void because they were granted in contravention of Arizona's *mandatory* disqualification statutes, they were rendered by a court which lacked personal or subject matter jurisdiction, and they were rendered by a court which acted in a manner inconsistent with due process. Grounds of disqualification provided by statutes are *mandatory*, not waivable, and any judgment rendered by disqualified judge is void. See *Lyon v. State*, 764 S.W.2d 1.

The trial judge's violations of *mandatory* disqualification statutes deprived the trial court of subject matter jurisdiction to enter the Order of January 11, 2002, which dismissed Petitioners' retained legal counsel. No presumptions of "*good cause*" should be afforded to judges who *repeatedly* failed to comply with *mandatory* disqualification statutes. These disqualification statutes are meant to be self-enforcing, not issues to be addressed much later on appeal from "*final judgments*" after prejudice has worked it evil. Prejudice has most definitely

"*worked its evil*" and resulted in final judgments which are grossly unjust and from which Appellants' appeal has *quite predictably failed*. The failure to disqualify by the trial judge and Division II judges, resulted in loss of subject matter jurisdiction over the state court proceedings, and warrants vacatur of the final judgments.

The State trial judge has committed an egregious constitutional tort against the Petitioners, by dismissing *by fiat of the trial court* their retained legal counsel, and by *repeatedly* failing to comply with Arizona's *mandatory* disqualification statutes. These "*final judgments*" have substantially violated the public interest. Justice requires the appearance of justice. There was neither the appearance nor the existence of justice in the State court proceedings.

CONCLUSION

Wherefore, Petitioners respectfully pray that this Court issue writ of mandamus, vacate Final Judgments under Ariz. R. Civ. P. 60(c)(4) and declare the Final Judgments to be void, *or in the alternative*, compel the Arizona Supreme Court (or Division II or the Trial Court) to vacate Final Judgments under Rule 60(c)(4), declare the Final Judgments to be void, and to proceed no further in the State court proceedings. Petitioners further pray that this Court grant Petitioners such other and further relief, *including the imposition of sanctions*, as it may deem to be just and equitable.

APPENDIX

APPENDIX A: Order of Arizona Supreme Court on April 20, 2006, which denied Petition for Review, denied Motion to Expedite Petition for Review, denied Renewed Motion to Expedite Petition for Review, denied Motion to Vacate Final Judgments Under Rule 60(c)(4).....App. 1

APPENDIX B: Order of Division II Arizona Court of Appeals on September 8, 2005, which denied Motion for Reconsideration.....App. 2

APPENDIX C: Memorandum Decision of Division II on August 18, 2005, which affirmed the "*final judgments*" of the trial court.....App. 3-17

APPENDIX D: Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342).....App. 18-20

APPENDIX E: Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304).....App. 21-23

APPENDIX F: Second Amended Judgment (Nunc Pro Tunc) of March 23, 2005.....App. 24-25

APPENDIX G: Amended Judgment (Nunc Pro Tunc) of January 4, 2005.....App.26-27

APPENDIX H: Judgment of November 26, 2004, from Pima County Superior Court, Case No. C333954 .....App. 28-29

APPENDIX HH: Order of November 24, 2004, from Pima County Superior Court, Case No. C333954.....App.30-32

APPENDIX I: Order of November 9, 2004, from Pima Case No. C333954.....App. 33-35

APPENDIX J: Order of April 29, 2004, Pima County Superior Court, Case No. C333954.....App. 36-37

APPENDIX K: Davidsons' Motion to Amend Defendants' Answer, To Add Counterclaims, and Add Parties in C333954 dated February 26, 2004.....App. 38-40

APPENDIX L: Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ.....App. 41-46

APPENDIX M: Mandate of Arizona Court of Appeals of November 26, 2003, (#2 CA-CV 2002-0051).....App. 47

APPENDIX N: Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ.....App. 48-51

APPENDIX O: Plaintiffs' Original Complaint & Application for Injunctive Relief in U.S. District Court Case # CV-03-00580-FRZ, cover page and prayer for relief .....App. 52-53

APPENDIX P: Order, Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR.....App. 54

APPENDIX Q: News Release of the Commission on Appellate Court Appointments on March 28, 2003 ....App. 55

APPENDIX R: Memorandum Decision, Appeal Dismissed, February 27, 2003, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2002-0051 .....App. 56-59

APPENDIX S: Notice of Public Meeting of the Commission on Appellate Court Appointments on December 13, 2002.....App. 60

APPENDIX T: Agenda of May 10, 2002, meeting of Commission on Appellate Court Appointments .....App. 61

APPENDIX U: Article, from Tucson Citizen on April 15, 2002.....App. 62

APPENDIX V: Order of January 11, 2002, in Pima Case No. C333954.....App. 63-64

APPENDIX VV: Notice of Change of Address, dated February 5, 2002, in Pima Case No. C333954..... .....App. 65

APPENDIX VVV: Notice of Appearance, dated February 5, 2002, in Pima Case No. C333954.....App. 66

APPENDIX VVVV: Notice of Appeal, dated February 11, 2002, in Pima Case No. C333954.....App. 67

APPENDIX W: Administrative Order No. 2001-119 of December, 19, 2001, by Arizona Supreme Court..App. 68

APPENDIX X: Motion to Withdraw as Counsel of Record and to Continue Trial of December 18, 2001, in Pima Case No. C333954.....App. 69-71

APPENDIX XX: Letter of October 17, 2001 from MJM to RD.....App. 72

APPENDIX Y: Announcement Letter of Change of Law Firm on January 15, 2001.....App.73-74

APPENDIX Z: Ariz. R. Civ. P., Rule 5.1 (A)(2) (B) and (C).....App. 75

App. 1

APPENDIX A

Supreme Court
STATE OF ARIZONA

April 20, 2006

RE: JAY GROSSMAN et ux v ROBERT DAVIDSON et ux
Arizona Supreme Court No. CV-05-0363-PR
Court of Appeals Division Two No. 2 CA-CV 05-0011
Pima County Superior Court No. C-333954

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 20, 2006, in regard to the above-referenced cause:

ORDERED: Motion to Expedite Petition for Review by Arizona Supreme Court = DENIED.

FURTHER ORDERED: Motion to Vacate Final Judgments Under Rule 60(C)(4) = DENIED.

FURTHER ORDERED: Renewed Motion to Expedite Petition for Review = DENIED.

FURTHER ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 20th day of April, 2006.

Noel K Dessaint, Clerk

App. 2

APPENDIX B

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

September 08. 2005 (Filed Sep. 8, 2005)

RE: GROSSMAN v. DAVIDSON
2 CA-CV 2005-0011
Pima County Superior Court Cause No. C-333954

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department A on September 07, 2005,

ORDERED: Motion for Reconsideration is DENIED.

Judge Florez, Judge Brammer and Judge Eckerstrom participated in the determination of this matter.

/s Peter J. Eckerstrom
Peter J. Eckerstrom
Acting Presiding Judge

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife, Plaintiffs/Appellees,	2 CA-CV 2005-0011 DEPARTMENT A
v.	**MEMORANDUM DECISION** Not for Publication
ROBERT MICHAEL DAVIDSON, and VANESSA DAVIDSON, aka VANESSA E. KOMAR, husband and wife, Defendants/Appellants	Rule 28, Rules of Civil Appellate Procedure (Filed Aug. 18, 2005)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. C-333954
Honorable Jane L. Eikleberry, Judge

AFFIRMED

Robert M. Davidson and
Vanessa E. Komar — Kilgore, Texas
In Propia Personae

Karp, Heurlin & Weiss, P.C.
Bruce R. Heurlin — Tucson
Attorneys for Plaintiffs/Appellees

BRAMMER, Judge.

¶1 Plaintiffs/appellees Jay and Eudice Grossman sued defendants/appellants Robert Davidson and Vanessa Komar, alleging Davidson had made false statements that had caused Grossman's employer to fire him and that had damaged Grossman's professional reputation. Davidson and Komar (collectively, the Davidsons) appeal from the trial court's grant of their former attorney's motion to withdraw his representation; its denial of their motion to amend their answer to add counterclaims and parties; its denial of their emergency motion to stay the proceedings; and its entry of default and judgment, including the imposition of sanctions against them. For the following reasons, we affirm.

Facts and Procedural History

¶2 On review of a default judgment, we view the facts in the light most favorable to sustaining the judgment.[1] See *Goglia v. Bodnar*, 156 Ariz. 12, 749 P.2d 921 (App. 1987). In July 1999, Dr. Jay Grossman filed a complaint against Dr. Robert Davidson and his wife Vanessa for defamation, abuse of process, intentional infliction of emotional distress, and intentional interference with contract. Grossman's allegations stemmed from a criminal complaint Davidson had filed in which he alleged that Grossman had physically assaulted him; Davidson's statements to that effect to Grossman's employer; and

[1] The Davidsons have failed to cite the record on appeal in either their statement of the case or their statement of facts, in violation of Rule 13(a)(4), Ariz. R. Civ. App. P., 17B A.R.S. Consequently, we look to the Grossmans' rendition of the factual and procedural background of this case, as well as our own review of the record. See *State Farm Mut. Auto. Ins. Co. V. Arrington*, 192 Ariz. 255, 963 P.2d 334 (App. 1998).

Davidson's report to a federal agency challenging Grossman's professional research practices. The Davidsons counterclaimed, alleging Jay Grossman had committed assault and battery on Davidson.

¶3 On December 18, 2001, the Davidsons' attorney, Michael Meehan, filed a motion to withdraw as counsel, citing failure of communication and lack of trust.[2] After the Davidsons failed to timely respond to the motion, the trial court granted it and continued the trial date. On February 7, 2002, Davidson filed a notice of apearance, stating that he was "representing the Defendants/Counterclaimants without an attorney." On February 13, Davidson filed a notice of appeal in this court challenging the trial court's grant of Meehan's motion. We dismissed the interlocutory appeal for lack of jurisdiction and awarded the Grossmans attorney fees and costs, finding that Davidson's attempt to appeal the trial court's gran of the withdrawal motion had been frivolous. *Grossman v. Davidson*, No. 2 CA-CV 2002-0051 (memorandum decision filed Feb. 27, 2003).[3]

¶4 Davidson then unsuccessfully petitioned to transfer the case to our supreme court and filed documents in federal courts, including the United States Supreme Court, challenging the trial court's grant of Meehan's motion to withdraw as counsel, alleging, among other counts, racketeering and conspiracy. In November 2003, the Arizona district court dismissed with prejudice Davidson's claims, and the Ninth Circuit Court of Appeals affirmed that dismissal.

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2 Meehan filed his motion four months before the schedule trial date, which the trial court rescheduled.

3 We also noted that, regardless of the procedural impropriety of the interlocutory appeal, Davidson had not filed his notice of apeal within the required thirty-day period, see Rule 9(a), Ariz. R. Civ. App. P., 17B A.R.S., and it was, accordingly, untimely.

¶5 After this court issued its mandate on November 26 2003, the trial court held a status conference on January 20, 2004, and set deadlines of March 19 for compliance with Rule 26.1, Ariz. R. Civ. P., 16 A.R.S., Pt. 1, and April 30 for the completion of discovery. Trial was set for October 12. On February 27, the Davidsons moved to amend their answer to add counterclaims and parties. On March 23, citing "excusable neglect," they belatedly moved to enlarge the time for filing the Rule 26.1 disclosure statement and to enlarge the discovery deadline. The trial court denied the motions on April 29, and warned them that filing groundless motions or attempting to further delay the proceedings would result in the imposition of sanctions. The Davidsons then filed an untimely "objection to minute entry," in which they argued that they had been deprived of "a competent state forum in which to raise [their] federal constitutional concerns" and insisted that the trial court had improperly denied their motion to add counterclaims and parties. The court viewed the motion as one for reconsideration, albeit untimely, and denied it.

¶6 The parties' joint pretrial statement was due to be filed September 22, 2004. The Davidsons refused to participate in the preparation of that statement, but on the day it was due, filed an emergency motion to stay the proceedings. That same day, the Grossmans filed a motion for entry of default and for sanctions based on the Davidsons' failure to participate in preparing the joint pretrial statement and their repeated attempts to delay the procedings and to harass the Grossmans with frivolous filings. The Davidsons opposed the motion, citing the various filings in federal court and the necessity of granting their motion for an emergency stay. The court granted the Grossmans' motion for default and sanctions on November 9. On November 16, the Davidsons moved to vacate the entry of default and the imposition of sanctions, which the court treated as a motion for reconsideration and

denied.

¶7 That month, the court conducted a hearing on damages, which the Davidsons did not attend, although the day before that hearing they had filed a petition for special action in the Arizona Supreme Court requesting that the entry of default and imposition of sanctions be vacated. On November 26, the trial court entered judgment in the Grossmans' favor in the amount of $7,849,031.27. The Davidsons filed a notice of appeal, another motion - in the trial court - to vacate the default judgment, and another notice of appeal.[4]

Motion to Withdraw as Counsel

¶8 The Davidsons challenge, on multiple grounds, the trial court's grant of Meehan's motion, made pursuant to Rule 5.1(a)(2)(B) and (C), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, to withdraw as counsel. The rule permits an attorney in a pending action to withdraw his or her representation if the attorney provides the reasons for that withdrawal in a written application. Ariz. R. Civ. P. 5.1(a)(2).

Constitutionality of Rule 5.1

¶9 The Davidsons first argue that Rule 5.1(a)(2)(B) and (C) is unconstitutional both on its face and as applied here. Citing "procedural and substantive due process grounds, equal protection grounds, takings clause grounds, and right to contract grounds," the Davidsons insist that the trial court's order granting Meehan's motion to withdraw as their counsel deprived them of their "presently-enjoyed benefit of retained legal representation in an ongoing civil proceeding."

¶10 As best we can discern, the Davidsons' argument appears to challenge the trial court's failure to conduct a hearing on Meehan's motion to withdraw and the failure

4 The trial court determined that, because of the multiple notices of appeal the Davidsons had filed, it lacked jurisdiction to rule on their motion to vacate the judgment.

of Rule 5.1 to mandate a hearing. But the record reflects, and the Davidsons do not appear to contest, that they neither requested a hearing nor objected at the time to Meehan's motion - on a constitutional basis or on any other ground.[5] *See* Ariz. R. Civ. P. 7.1(a), 16 A.R.S., Pt. 1 (party opposing motion required to file answering memorandum within ten days of filing of motion); Ariz. R. Civ. P. 7.1(b) (when party fails to timely oppose motion, trial court may dispose of motion summarily and deem failure to respond as consent to granting or denial). Davidson's February 13 "notice of appeal" in this court challenging the January 11 order granting withdrawal was, in addition to being procedurally improper, clearly untimely. This is so even if we were to characterize it as a response to the motion to withdraw or as a motion for reconsideration of the order granting that motion. *See* Ariz. R. Civ. P. 7.1(a); *see also Schwab v. Ames Constr.*, 207 Ariz. 56, 83 P.3d 56 (App. 2004) (if party opposinig motion fails to respond, trial court may summarily dispose of motion). Accordingly, the Davidsons waived their right to challenge both that motion and the trial court's granting the motion. *See Valley Nat'l Bank of Ariz. V. Meneghin*, 130 Ariz. 119, 634 P.2d 570 (1981) (appellants who failed to object to attorney's motion to withdraw voluntarily and knowingly waived their later challenge to court's granting motion);[6] *Wenc v. Sierra Vista Unified Sch. Dist. No. 68, 210* Ariz. 183, 108 P.3d

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5 In an untimely response to the motion to withdraw, Davidson simply filed a notice in the trial court of his own appearance as counsel.

6 Our supreme court in *Meneghin* rejected the appellants' challenge to the trial court's grant of a motion to withdraw as counsel, finding that, despite the motion's failure to comply with binding procedural requirements, such as obtaining the appellants' signatures, and the fact that the trial date had already been set, the appellants had waived their objection to that motion on those grounds on appeal.

962 (App. 2005) (arguments not raised in trial court are waived on appeal).

¶11 Consequently, the Davidsons' bare and entirely unsupported assertion that they "never waived [their] right to appeal the trial judge's signed ruling. . . order[ing] attorney withdrawal" notwithstanding, they have waived their challenges to Rule 5.1's facial validity and its application to their case on appeal.

Order Granting Withdrawal

¶12 The Davidsons additionally challenge, on abuse of discretion grounds, the trial court's order granting Meehan's motion to withdraw as counsel, arguing that the order arbitrarily deprived them of their legal representation and absolved Meehan and his law firm of their contractual and professional duties. Because the Davidsons failed to object to the motion to witdraw, we do not address this issue.[7]

Motion to Amend Answer and Add Counterclaims and Parties

¶13 The Davidsons also challenge without citation to legal authority as required by Rule 13(a)(6), Ariz. R. Civ. P., 17B A.R.S., the trial court's order denying their motions to amend their answer and to add counterclaims and parties. We review the court's denial of these motions for an abuse of discretion. *See State Comp. Fund v. Yellow Cab Co. Of Phoenix*, 197 Ariz. 120, 3 P.3d 1040 (App. 1999) (motion to add party); *Tobel v. Travelers Ins. Co.*, 195 Ariz. 363, 988 P.2d 148 (App. 1999) (motion to add claims); *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 909 P.2d 399 (App. 1995) (motion to amend answer).

¶14 The Davidsons filed their motion on February 27,

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7 The Davidsons also contend Meehan, his law firm, the Grossmans, and the trial judge "conspired with each other, as State Actors," to deprive them of their constitutionally protected property interest in retained legal counsel. Because this contention is unsupported by any legal authority, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6).

2004, seven months before the scheduled trial date and two months before the deadline for completing discovery. They sought to amend their answer to the first amended complaint to add several counterclaims and defenses that "have matured or been acquired by the defendants, consequent to the dismissal of [the case brought in federal court]" and to add as parties two individuals and one corporation. The trial court denied all requests, reasoning as follows:

> Defendants belatedly seek to unnecessarily enlarge the scope of this action to include claims and parties, some, if not all, of which are presently before the 9th Circuit Court of Appeals. Defendant. . . Davidson was advised of the trial date, the deadline for complying with Rule 26.1 and the discovery deadline during the status conference of January 20, 2004. The motion to enlarge the deadlines was filed after the disclosure deadline. Defendants' motions appear to be filed for purposes of delay and harassment. To allow the extensive proposed amendments to the answer and the counterclaim would greatly prejudice the plaintiffs given that the trial date is set for October 13, 2004. This case has been pending for almost five years and absent extraordinary and unforeseen circumstances, the trial date will not be continued.

¶15 The Davidsons insist that the court's denial of their motion to add counterclaims and parties was "tantamount to denying [them] the right to argue and prove [a] pattern of misconduct and conspiracy" claiming the ruling prevented them from asserting claims under the Prescription Drug User Fee Act. (Emphasis deleted.) "[A] party may amend [a] pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires." Ariz. R. Civ. P. 15(a), 16 A.R.S., Pt. 1. "Nonetheless, it is within the sound discretion of the trial court whether, under all the facts and circumstances of the case, an amendment should be permitted." *Gulf Homes, Inc.*

v. Goubeaux, 136 Ariz. 33, 37, 664 P.2d 183, 187 (1983).

> A trial court does not abuse its discretion by denying a motion to amend if it finds undue delay in the request, bad faith or a dilatory motive on the part of the movant, undue prejudice to the opposing party as a result of the amendment, or futility in the amendment.

Bishop v. State Dep't of Corr., 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992).

¶16 The trial court found that the Davidsons' motion satisfied all of the factors outlined by Division One of this court in *Bishop:* undue delay, bad faith for the purpose of harassment, and great prejudice to the opposing party. The record supports the court's findings and its ultimate denial of the motion. The Davidsons filed their motion almost five years after the Grossmans had filed their complaint and only two months before the deadline for the completion of discovery. The substantial delay in presenting additional claims and defenses on the eve of the close of discovery could well be construed as constituting bad faith. And the numerous proposed additions would have required the Grossmans to spend significant time addressing the new theories, thereby causing them considerable prejudice in light of the upcoming October trial date. *See Haynes,* 184 Ariz. At 336, 909 P.2d at 403 ("Prejudice is the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.'"), *quoting Owen v. Superior Court,* 133 Ariz. 75, 81, 649 P.2d 278, 284 (1982); *cf. Haynes* (no abuse of discretion in trial court's denial of motion to amend answer based on delay of sixteen months, prior finding that movant had failed to exercise due diligence with last-minute reversal of position, and undue prejudice to plaintiff); *Bishop* (no abuse of discretion in trial court's finding undue delay in filing motion to amend two years after complaint filed and just months before scheduled trial date).

¶17 Accordingly, although "[d]enial of leave to amend is generally an abuse of discretion where the amendment merely advances a new legal theory," *Uyleman v. D.S. Rentco,*194 Ariz. 300 ¶ 10, 981 P.2d 1081, 1083 (App. 1999), the Davidsons' motion sought to accomplish far more than simply appending an additional legal theory to an existing claim. And "'denial [of a motion to amend a pleading] is deemed a proper exercise of the court's discretion when the amendment comes late and raises new issues requiring preparation for factual discovery which would not otherwise have been necessitated nor expected, thus requiring delay in the decision of the case.'" *Haynes,* 184 Ariz. At 336, 909 P.2d at 403, *quoting Owen,* 133 Ariz. At 81, 649 P.2d at 284. The trial court here accurately noted that the discovery deadline was only two months away and the proposed amendments would have required extensive preparation and discovery by the Grossmans. For all of the above reasons, the trial court did not abuse its discretion in rejecting the Davidsons' attempt to add several counterclaims and defenses and three new parties to the action. *See Yellow Cab; Tobel; Haynes.*

Denial of Emergency Motion to Stay Proceedings; Entry of Default and Sanctions

¶18 Again without citation to legal authority as required by Rule 13(a)(6), Ariz. R.Civ. App. P., the Davidsons challenge as an abuse of discretion th trial court's denial of their emergency motion to stay the proceedings and its grant of the Grossmans' motion for default and entry of sanctions. Despite the Davidsons' failure to support their assertions, we briefly address each in turn because we conclude they have no merit.

Motion to Stay

¶19 In denying the Davidsons' emergency motion to stay the proceedings, the trial court found "no valid reason" for a stay, noting that they had "waited until the

eve of trial" to request an emergency stay "when the appropriate time to raise the claims [they] now seek to raise was in December of 2001 when their attorney filed the motion to withdraw." The court further found the motion "groundless and. . . filed primarily for the purposes of harassment and delay."

¶20 We see no error in those conclusions. The Davidsons filed their motion on September 22, 2004, the date of the deadline set for filing the joint pretrial statement. The Davidsons neither participated in preparing the joint pretrial statement nor filed a separate statement.[8] Their motion for an emergency stay was filed only twenty days before the scheduled trial date. And the trial court properly concluded that the facts unerlying the motion, which had been premised on Meehan's motion to withdraw as counsel and the alleged "bad faith" motivating that motion, had been known to the Davidsons in December 2001, when Meehan had moved to withdraw as counsel. (Emphasis deleted.) The court did not abuse its discretion. *See generally State v. Ott*, 167 Ariz. 420, 808 P.2d 305 (App. 1990) (grant or denial of motion to stay proceedings reviewed for abuse of discretion).

Entry of Default and Sanctions

¶21 The Davidsons also challenge the trial court's grant of the Grossmans' motion for entry of default and sanctions. We review for a clear abuse of discretion a trial court's decision to strike pleadings or impose other sanctions for discovery violations. *See Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 993 P.2d 1110 (App. 1999); *Montgomery Ward & Co. v. Superior Court*, 176 Ariz. 619, 863 P.2d 911 (App. 1993).

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8 Although the Davidsons insist that they "never '*refused*' to participate in the preparation of a joint pretrial statement," the record does not support that assertion and, indeed, the Davidsons do not suggest that they ever actively participated in preparing it.

¶22 In granting the Grossmans' motion for default and sanctions, the trial court noted that it had "specifically warned defendants that taking such actions" as filing motions "for the purposes of harassment and delay [or]. . . refus[ing] to participate in the preparation of a joint pretrial statement" could result in the imposition of sanctions, including striking their pleadings or entering of a default against them. The court granted the motion for default and sanctions because the Davidsons had "chosen to ignore the Court's warning and ha[d] continued to file frivolous motions for the purposes of delay of the proceedings and harassment of the plaintiffs" and had "attempted to unreasonably enlarge the scope of the proceedings."

¶23 The trial court appears to have granted the Grossmans' motion pursuant to Rules 16(f) and 37(b)(2)(B), (C), and (D), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. Rule 16(f) provides, in relevant part:

> If a party . . . fails to obey a scheduling or pretrial order . . . or . . . fails to participate in good faith in . . . the preparation of the joint pretrial statement, the judge . . . shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D).

Rule 37(b)(2) provides, inter alia, for imposition of the following sanctions when a party fails to obey a pretrail order:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders . . . .

The Davidsons opposed the Grossmans' motion, arguing that the court's grant of Meehan's motion to withdraw; the Davidsons' pending federal court filings; and various, allegedly erroneous, state and federal court rulings during the pendency of this case precluded an entry of default and sanctions against them.

¶24 But, as the trial court noted in granting the Grossmans' motion, in its April 2004 denial of the Davidsons' motion to add counterclaims and parties, the court had admonished the Davidsons for their belated attempts to unnecessarily enlarge the scope of the action, delay the proceedings and harass the Grossmans, and had warned them that any additional, frivolous filings of groundless motions; delaying; harassing; or attempting to expand the action would result in the imposition of sanctions. Despite the warning, the Davidsons belatedly "objected" to the denial of their motion to amend their answer and to enlarge the time for discovery; filed an untimely objection to the Grossmans' motion for entry of judgment to enforce amounts ordered paid by this court and the United States Supreme Court; failed to participate in preparing the joint pretrial statement; requested an an emergency stay less than one month before the scheduled trial date; and generally failed to request hearings on motions or rulings to which they objected, yet continued to raise those challenges in later, unrelated pleadings.

¶25 And, as we have outlined in our preceeding analysis, the trial court's decision to deny the Davidsons' motion to add counterclaims and parties was based on the resulting prejudice to the Grossmans and the Davidsons' delay in so moving and was not an abuse of the court's discretion. The court's decision to sanction the Davidsons because of their attempts to unreasonably enlarge the

proceedings by failing to participate in preparing the pretrial statement and filing an emergency motion to stay the proceedings was likewise not an abuse of discretion in light of the court's prior explicit warnings. *Cf. Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 692 P.2d 309 (App. 1984) (sanction of default pursuant to Rule 37(b)(2) not an abuse of discretion when party had delayed objecting to discovery order until two weeks before deadline, failed to meet extended deadline, and failed to completely comply with order).

¶26 The Davidsons' broad assertion that the trial "judge is *biased* against the Davidsons in particular, and *biased* against racketeering actions, in general" finds no support in the record. The judge's statement that the Davidsons had "attempted to unreasonably enlarge the scope of the proceedings" does not, as they suggest, evince any bias. The Davidsons appear to suggest that, during the January 2004 status conference, the court improperly encouraged them to file the motion to amend their answer and add counterclaims and that, by telling them they must "file any motions to . . . amend . . . promptly," implicitly communicated that filing such motions would not be frivolous. But the record reflects the court made no such representation, and indeed, it could not have known the content of any proposed motion until it was filed. We reject the Davidsons' assertion of bias.

¶27 The trial court's denial of the Davidsons' motion and its grant of the Grossmans' motions was not an abuse of discretion. *See Wayne Cook; Montgomery Ward; see generally Ott.*

Rule 60 (c)

¶28 The Davidsons lastly contend the trial court's entry of default and sanctions against them, its November 26, 2004 judgment in favor of the Grossmans, and its amended judgment, entered nunc pro tunc on January 4,

2005, should be vacated pursuant to Rule 60(c), Ariz. R. Civ. P., 16 A.R.S., Pt 2. Even were the Davidsons able to make those challenges in th trial court, however, the record establishes that they never challenged the entry of default and sanctions or the court's judgment on the basis of Rule 60(c) in the trial court.[9] They have, accordingly, waived the contentions on appeal. *See Trantor v. Fredrikson,* 179 Ariz. 299, 878 P.2d 657 (1994).

¶29 Affirmed. The Davidsons' request for fees and costs is rejected, as they have not prevailed on appeal.

/s J. William Brammer, Jr

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

/s M. Jan Florez

M. JAN FLOREZ, Judge

9 We note that the Davidsons did cite Rule 60(c) as a basis for relief in their motion to vacate the default judgment. That motion, however, was filed on December 9, 2004, a day after the Davidsons had filed a notice of apeal in this court, appealing, inter alia, the trial court's ruling granting theGrossmans' motion for default and sanctions. Therefore, the trial court was without jurisdiction to rule the Davidsons' motion, as it so noted in a subsequent minute entry.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al., No. 03-17342
Plaintiffs - Appellants, D.C. No. CV-03-00110-FRZ
v.

JUDGEMENT

VIVRA INC., et al., (Filed Apr. 4, 2005)
Defendants - Appellees.

Appeal from the United States District Court for the District of Arizona (Tucson).

This case came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

On consideration whereof, it is now here orderd and adjudged by this Court, that the judgment of the said district Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Monday, April 4, 2005

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al.,
Plaintiffs - Appellants,
v.
VIVRA INC.; et al.,
Defendant -Appellees

No. 03-17342

D.C. No. CV03-00110-FRZ

MEMORANDUM*

(Filed Apr. 4, 2005)

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and PAEZ,
Circuit Judges.

Robert M. Davidson appeals pro se the district court's judgment dismissing his action pursuant to the *Younger* abstention doctrine. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Baffert v. Calif. Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003), we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Davidson requested that the district court stay the ongoing proceedings in *Grossman v. Davidson*, Pima County Superior Court Case No. C-333954 (the "State Action"). Thus, there is "no doubt" that the federal injunctive relief would interfere directly with those proceedings." *Baffert*, 332 F.3d at 617 (*Younger* abstention proper where party sought to enjoin state administrative proceedings).

Contrary to Davidson's contention, *Younger* abstention is not limited to criminal procedings. *See Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791 (9th Cir. 2001) ("The *Younger* principle applies to civil proceedings...in which important state interests are involved."). Davidson's allegation that the Arizona statutory scheme regarding the withdrawal of counsel is unconstitutional is sufficiently important to invoke *Younger* abstention. Furthermore, there is no support for Davidson's contention that he was precluded from raising federal law claims in the state forum. *See Am. Consumer Publ'g Ass'n, Inc. V. Margosian*, 349 F.3d 1122, 1127 (9th Cir. 2003) ("Federal courts presume that a state court is competent to determine issues of federal law, even if those issues involve federal constitutional claims."). Finally, Davidson contends that the withdrawal of counsel in State action deprived him of his federal constitutional rights and that the "extraordinary circumstances" exception to *Younger* abstention therefore applies. This contention lacks merit. *See Baffert*, 332 F.3d at 621 ("[T]he constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention.").

Davidson's remaining contentions are similarly unpersuasive.

We deny all pending motions.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al., Plaintiffs - Appellants,
v.
MICHAEL J. MEEHAN; et al., Defendants - Appellees.

No. 04-15304
D.C. No. CV-03-00580-FRZ

JUDGMENT
(Filed Apr. 4, 2005)

Appeal from the United States District Court for the District of Arizona (Tucson).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Monday, April 04, 2005.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al., Plaintiffs-Appellants, v. MICHAEL J. MEEHAN; et al., Defendants-Appellees.

No. 04-15304
D.C. No. CV-03-00580-FRZ

MEMORANDUM*
(Filed Apr. 4, 2005)

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges

Robert M. Davidson and his spouse Vanessa Komar appeal pro se the district court's judgment dismissing their action in which they alleged constitutional violations and various state-law claims against their former attorney and his law firm. We have jurisdiction under 28 U.S.C. § 1291. We review de novo whether *Younger* abstention applies. *Baffert v. Calif. Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003). We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Although appellant's request for compensatory damages may preclude dismissal under *Younger* abstention, see *Gilbertson v. Albright,* 381 F.3d 965, 968 (9th Cir. 2004) (en banc), we may affirm dismissal on any ground supported by the record, *see Wolfe v. Strankman,* 392 F.3d 358, 362 (9th Cir. 2004). Dismissal was appropriate because appellants' allegations fail to state constitutional claim against their privately-retained attorney and his law firm. *See Briley v. State of Cal.,* 564 F.2d 849, 855 (9th cir. 1977) ("We have repeatedly held that a privately-retained attorney does not act under color of state law for purposes of actions brought under the Civil Rights Act.")

Appellants' remaining contentions lack merit.

We deny all pending motions.

AFFIRMED.

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,

vs.

ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.

ROBERT MICHAEL DAVIDSON and VANESSA KOMAR,
Defendants/Counterclaimants,

vs.

JAY GROSSMAN and EUDICE GROSSMAN,
Plaintiffs/Counterdefendants.

No. C 333954

SECOND AMENDED JUDGMENT (Nunc Pro Tunc)

(Filed Mar. 23, 2005)

(Judge Jane L. Eikleberry)

Pursuant to the Court's November 9, 2004 Minute Entry and the November 23, 2004, hearing and good cause appearing,

Judgment is entered on all Counts of the First Amended Complaint and on the Counterclaim in favor of Jay Grossman and Eudice Grossman (Plaintiffs), husband and wife, and against both Robert Michael Davidson and Vanessa Davidson, also known as Vanessa E. Komar, (Defendants), husband and wife, individually, jointly, and severally and as to their marital community.

The Court finds as fact that as to all Counts of the First Amended Complaint and as to frivolous pleadings filed by the

Defendants in this action that Defendants acted willfully and maliciously and with the intent to cause injury to Plaintiffs.

Damages are awarded in favor of Plaintiffs and against Defendants as follows:

1. Intentional Interference with Contract:
   a. Sale of Medical Practice/Stock Purchase and Sale Agreement $2,493,921.00
   b. Loss of Salary $3,261,699.00
2. Intentional Defamation, Slander, and Slander Per Se,
   Damage to Professional and Personal Reputation $1,035,111.00
3. Intentional Abuse of Process ----- and --------
4. Intentional Infliction of Emotional Distress $500,000.00.
5. Punitive Damages $500,000.00.
6. Sanctions:
   1. Reimbursement of costs and attorneys' fees $58,300.27.
   2. Sanctions in addition to the above $ -0- .

Judgment is so ordered in favor of Plaintiffs and against Defendants in the total amount of $7,849,031.27.

The total amount of this Judgment shall earn interest at the legal rate of 10% per annum from the date of this Judgment until paid in full.

DATED March 22, 2005.

Jane L. Eikleberry

JANE L. EIKLEBERRY
Judge, Pima County Superior Court

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.
ROBERT MICHAEL DAVIDSON and VANESSA KOMAR,
Defendants/Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN,
Plaintiffs/Counterdefendants.

No. C 333954

AMENDED JUDGMENT (Nunc Pro Tunc)

(Filed Jan. 4, 2005)

(Judge Jane L. Eikleberry)

Pursuant to the Court's November 9, 2004 Minute Entry and the November 23, 2004, hearing and good cause appearing,

Judgment is entered on all Counts of the First Amended Complaint and on the Counterclaim in favor of Jay Grossman and Eudice Grossman (Plaintiffs), husband and wife, and against both Robert Michael Davidson and Vanessa Davidson, also known as Vanessa E. Komar, (Defendants), husband and wife, individually, jointly, and severally and as to their marital community.

The Court finds as fact that as to all Counts of the First Amended Complaint and as to frivolous pleadings filed by the

Plaintiffs in this action that Defendants acted willfully and maliciously and with the intent to cause injury to Plaintiffs.

Damages are awarded in favor of Plaintiffs and against Defendants as follows:

1. Intentional Interference with Contract:
   a. Sale of Medical Practice/Stock Purchase and Sale Agreement $2,493,921.00
   b. Loss of Salary $3,261,699.00
2. Intentional Defamation, Slander, and Slander Per Se,
   Damage to Professional and Personal Reputation $1,035,111.00
3. Intentional Abuse of Process ----- and --------
4. Intentional Infliction of Emotional Distress $500,000.00.
5. Punitive Damages $500,000.00.
6. Sanctions:
   1. Reimbursement of costs and attorneys' fees $58,300.27.
   2. Sanctions in addition to the above $ -0- .

Judgment is so ordered in favor of Plaintiffs and against Defendants in the total amount of $7,849,031.27.

The total amount of this Judgment shall earn interest at the legal rate of 10% per annum from the date of this Judgment until paid in full.

DATED January 3, 2005..

/s Jane L. Eikleberry
JANE L. EIKLEBERRY
Judge, Pima County Superior Court

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.
ROBERT MICHAEL DAVIDSON and VANESSA KOMAR,
Defendants/Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN,
Plaintiffs/Counterdefendants.

No. C 333954

JUDGMENT
(Filed Nov. 26, 2004)
(Judge Jane L. Eikleberry)

Pursuant to the Court's November 9, 2004 Minute Entry and the November 23, 2004, hearing and good cause appearing,

Judgment is entered on all Counts of the First Amended Complaint and on the Counterclaim in favor of Jay Grossman and Eudice Grossman (Plaintiffs), husband and wife, and against both Robert Michael Davidson and Vanessa Davidson, also known as Vanessa E. Komar, (Defendants), husband and wife, individually, jointly, and severally and as to their marital community.

The Court finds as fact that as to all Counts of the First Amended Complaint and as to frivolous pleadings filed by the

Plaintiffs in this action that Defendants acted willfully and Damages are awarded in favor of Plaintiffs and against Defendants as follows:

1. Intentional Interference with Contract:
   a. Sale of Medical Practice/Stock Purchase and Sale Agreement $2,493,921.00
   b. Loss of Salary $3,261,699.00
2. Intentional Defamation, Slander, and Slander Per Se,
   Damage to Professional and Personal Reputation $1,035,111.00
3. Intentional Abuse of Process $ ---------- and
4. Intentional Infliction of Emotional Distress $500,000.00.
5. Punitive Damages $500,000.00.
6. Sanctions:
   1. Reimbursement of costs and attorneys' fees $58,300.27.
   2. Sanctions in addition to the above $ -0- .

Judgment is so ordered in favor of Plaintiffs and against Defendants in the total amount of $7,849,031.27.

The total amount of this Judgment shall earn interest at the legal rate of 10% per annum from the date of this Judgment until paid in full.

DATED November 24, 2004.

Jane L. Eikleberry
JANE L. EIKLEBERRY
Judge, Pima County Superior Court

APPENDIX HH

ARIZONA SUPERIOR COURT, PIMA COUNTY
JUDGE: HON. JANE L. EIKLEBERRY
CASE NO. C-333954
COURT REPORTER: NONE
DATE: November 24, 2004

JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a/k/a VANESSA E. KOMAR, h/w
Defendants

ROBERT MICHAEL DAVIDSON and VANESSA E. KOMAR, h/w
Defendants/Counterclaimants,
v.
JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs/Counterdefendants.

MINUTE ENTRY UNDER ADVISEMENT RULING
(Filed Nov. 24, 2004)

The Court has considered all of the evidence produced and the arguments of counsel made at the Rule 55(b)(2) hearing. Plaintiffs' complaint alleges defamation, slander, and slander *per se*, abuse of process, intentional infliction of emotional distress, and intentional interference with a contract. Plaintiffs seek an award of damages for financial losses incurred in connection with the sale of Dr. Grossman's medical practice and the stock purchase and sale of Vivra stock, lost income, damage to Dr. Grossman's professional and personal reputation, emotional distress, and punitive damages, as well as attorneys' fees and costs.

MINUTE ENTRY

Dr. Grossman's financial records support his lost income claim. In 1997, in his first year of employment with Vivra he earned $734,766.00. In 1998 he earned $767,815.00. In 1999, when his employment was terminated in July, he made $278,590.00. In the year 2000, he made $9,175.00 in 2001 he made $219,058.00, in 2002 he made $541,970.00 and in 2003 he made $535,500.00. Using Dr. Grossman's 1998 income as a benchmark, his income loss for the years 1997 through 2003 totals $2,254,782.00. Dr. Grossman had a ten year contract with Vivra which was canceled in its third year. He is entitled to recoup his lost income resulting from the defamation, tortuous interference with contractual relations and abuse of process for seven years after the termination. Accordingly, the Court must attempt to calculate the future lost income from the three years remaining on that contract of 2004, 2005 and 2006. The Court did not use the earnings records from 1999 or 2000 as those years were aberrant years. Using the income figures from 2001, 2002 and 2003, the Court finds an average earnings loss as a result of losing employment at Vivra of $335,639.00 per year and hereby awards plaintiffs the sum of $1,006,917.00 for lost income for years 2004, 2005, and 2006, the last three years of the contract with Vivra.

Plaintiffs are also awarded the sum of $2,493,921.00 for the losses in connection with the sale of Dr. Grossman's medical practice and the stock purchase and sale, including attorneys' fees spent in connection with litigation of those matters.

The evidence supports Dr. Grossman's claim that he has been virtually black-balled from the medical research community and that his professional reputation has been seriously damaged as a result of the wrongful actions of Dr. Davidson. Accepting the plaintiffs' arguments regarding the value of the damage to Dr. Grossman's professional and personal reputation, the Court hereby awards plaintiffs the sum of $1,035,111.00.

The Court also awards plaintiffs punitive damages in the amount of $500,000.00. Plaintiffs are awarded their attorneys' fees and costs in the amount of $58,300.27 as sanctions.

Judgment signed.

Mary Silva, Deputy Clerk
by George Hofmeister, J.A.A.

APPENDIX I

ARIZONA SUPERIOR COURT, PIMA COUNTY
JUDGE: HON. JANE L. EIKLEBERRY
CASE NO. **C-333954**
COURT REPORTER: NONE
DATE: November 9, 2004

JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a/k/a VANESSA E. KOMAR, h/w
Defendants

ROBERT MICHAEL DAVIDSON and VANESSA E. KOMAR, h/w
Defendants/Counterclaimants,
v.
JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs/Counterdefendants.

MINUTE ENTRY
IN CHAMBERS RULINGS RE: DEFENDANTS' EMERGENCY MOTION TO STAY THE PROCEEDINGS AND PLAINTIFFS' MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

(Filed Nov. 9, 2004)

The Court has reviewed and carefully considered both parties' motions and objections. The Court finds that the defendants have asserted no valid reason to stay these proceedings. This case was originally filed on July 2, 1999 and is the oldest case pending before this division of the Pima County Superior Court. Defendants have had ample opportunity to raise

their claims and the Court notes that when defendants' attorneys filed the motion to withdraw as counsel of record, the defendants failed to object to the motion. Nonetheless, they filed an appeal from the Court's granting of the motion to withdraw. The Arizona Court Appeals rejected the appeal. Defendants argue that they hav asserted a federal constitutional challenge to *Arizona Rule of Civil Procedure* 5.1 and this is presently pending before the Ninth Circuit Court of Appeals. The Court has reviewed a copy of defendants' petition for writ of certiorari to the United States Supreme Court which was rejected as untimely. Defendants waited until the eve of trial to file a request for an emergency stay when the appropriate time to raise the claims they now seek to raise was in December of 2001 when their attorney filed the motion to withdraw. The Court finds that defendants' motion for an emergency stay is groundless and was filed primarily for the purposes of harassment and delay. Defendants' motion to stay proceedings is hereby denied.

Plaintiffs filed a motion for entry of default and sanctions arguing that the motion to stay the proceedings was filed for the purposes of harassment and delay, in direct violation of the Court's prior warnings. Defendants also refused to participate in the preparation of a joint pretrial statement. The Court has specifically warned defendants that taking such actions might result in the imposition of sanctions, including the striking of counterclaims, the striking of their answer, the entering of a default against them and an award of additional attorneys' fees and costs. The minute entry of April 29, 2004, states:

> Defendants are warned that filing groundless motions, taking actions primarily for delay or harassment, and attempts to unreasonably expand or delay the proceeding may result in the imposition of sanctions including but not limited to, the striking of their counterclaim, the striking

of their answer, entering of a default against them, and an award of additional attorneys fees and costs to plaintiff.

Defendants have chosen to ignore the Court's warning and have continued to file frivolous motions for the purposes of delay of the proceedings and harassment of the plaintiffs. Defendants have also attempted to unreasonably enlarge the scope of the proceedings. Accordingly, plaintiffs motion for entry of default and sanctions is hereby granted. Defendants' counterclaim is hereby dismissed with prejudice. Plaintiffs are awarded their attorney's fees and costs incurred in defending the allegations of the counterclaim. Defendants' answer is stricken and defendants are precluded from defending the allegations contained in the plaintiffs' first amended complaint.

A hearing is hereby set pursuant to Rule 55(b)(2) for Tuesday, November 23, 2004 at 1:30 p.m. at which time the plaintiffs may present evidence of damages. The estimated time of hearing is one hour.

/s Jane L. Eikleberry

Jane L. Eikleberry
Judge of the Superior Court

APPENDIX J

ARIZONA SUPERIOR COURT, PIMA COUNTY
JUDGE: HON. JANE L. EIKLEBERRY
CASE NO. **C-333954** COURT REPORTER: NONE
DATE: April 29, 2004

JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a/k/a VANESSA E. KOMAR, h/w
Defendants

ROBERT MICHAEL DAVIDSON and VANESSA E. KOMAR, h/w
Defendants/Counterclaimants,
v.
JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs/Counterdefendants.

MINUTE ENTRY
IN CHAMBERS RULINGS RE: DEFENDANTS' MOTION TO AMEND DEFENDANTS' ANSWER, TO ADD COUNTERCLAIMS AND ADD PARTIES, PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO PAY PLAINTIFFS FOR COSTS AND ATTORNEYS' FEES ASSESSED FOR FRIVOLOUS APPEALS, DEFENDANTS' MOTION TO ENLARGE TIME TO FILE RULE 26.1 DISCLOSURE STATEMENT AND DEFENDANTS' MOTION TO ENLARGE TIME FOR THE DISCOVERY DEADLINE

(Filed Apr. 29, 2004)

The Court has reviewed all of the motions, oppositions and replies submitted. The complaint in this action was filed on July 2, 1999. The case is set for trial on October 13, 2004. On January 20, 2004, the parties were ordered to comply with Rule 26.1 on or before Friday, March 19, 2004. The discovery deadline was set

for Friday, April 30, 2004.

Defendants belatedly seek to unnecessarily enlarge the scope of this action to include claims and parties, some, if not all, of which are presently before the 9th Circuit Court of Appeals. Defendant Robert Michael Davidson was advised of the trial date, the deadline for complying with Rule 26.1 and the discovery deadline during the status conference of January 20, 2004. The motion to enlarge the deadlines was filed after the disclosure deadline. Defendants' motions appear to be filed for purposes of delay and harassment. To allow the extensive proposed amendments to the answer and the counterclaim would greatly prejudice the plaintiffs given that the trial date is set for October 13, 2004. This case has been pending for almost five years and absent extraordinary and unforeseen circumstances, the trial date not be continued.

Defendants' motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with Rule 26.1 and to extend the discovery deadline are hereby denied.

Plaintiffs' motion for sanctions is hereby denied at this time with leave granted to refile the motion if warranted. Defendants are warned that filing groundless motions, taking actions primarily for delay or harassment, and attempts to unreasonably expand or delay the proceeding may result in the imposition of sanctions including, but not limited to, the striking of their counterclaim, the striking of their answer, entering of a default against them, and an award of additional attorneys' fees and costs to plaintiff.

Defendants delivered a copy of their disclosure statement to the Court. Defendants are advised that disclosure statements are neither filed with the clerk or copied to the court.

APPENDIX K

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE C OUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,

vs.

ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.

No. 333954

MOTION TO AMEND DEFENDANTS' ANSWER, TO ADD COUNTERCLAIMS, AND ADD PARTIES

(Assigned to Judge Jane L. Eikleberry)

Pursuant to Rule 15(a), Ariz. R. Civ. P., the Defendants move this Court for an Order to Amend the Answer to First Amended Complaint and Counterclaim. The Defendants wish to add counterclaims, with the permission of this Court, under Rule 13(e), Ariz. R. Civ. P., which have matured or been acquired by the defendants, consequent to the dismissal of U.S. District Court Case #03-CV-110-TUC-FRZ under the doctrine of Younger abstention. The Defendants wish to also add parties under Rule 19(a), Ariz. R. Civ. P.

MEMORANDUM OF POINTS AND AUTHORITIES

The purpose of rule 15, Ariz. R.Civ. P. is to encourage permitting pleadings to be amended so as to facilitate the efficient and effective resolution of an entire controversy. While a request for leave to amend is one addressed to the discretion of the trial court, the policy of the Rule favors the liberal allowance of requests to amend. Cagle v. Carr, 101 Ariz. 225, 418 P.2d 381 (1966). Since the additional counterclaims asserted, arose out of

the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the proposed amendment should relate back to the date of the original pleading. A proposed amendment adding additional counterdefendants, will relate back if the party to be brought in by amendment, has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. Of note, the proposed parties in Pima County Case # 333954, Jay Grossman, Eudice Grossman, Charles Ott, Gayle Petrillo, and Vivra Holdings Inc, were parties to the U.S. District Court action, Case #03-CV110-TUC-FRZ.

The statute of limitations is tolled, for all of the additional counts to this complaint, under the doctrine of fraudulent concealment, or the doctrine of continuing tort, or the doctrine of equitable tolling, or the doctrine of regulatory estoppel, or the doctrine of constitutional regulatory estoppel, or the doctrine of concerted action (conspiracy). Thee is an ongoing conspiracy to defraud, conceal fraud, and perpetuate fraud from which the Davidsons have suffered [and continue to suffer] injury to their business or property. Jay Grossman, Eudice Grossman, Charles Ott, Gayle Petrillo, and Vivra Holding Inc, are estopped from asserting the statute of limitations as a defense to this Counterclaim under the doctrine of fraudulent concealment, or the doctrine of equitable estoppel, or the doctrine of equitable tolling, or the doctrine of regulatory estoppel, or the doctrine of constitutional ~~regulatory~~ estopel, or the doctrine of continuing tort, or the doctrine of concerted action (conspiracy).

Under Rule 13(e), Ariz. R. Civ. Pl, a claim which either matured or was acquired by the pleader afer serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading. A counterclaim may not be asserted unless it has matured at the time the answer is filed. Cochise Hotels,

Inc. v. Douglas Hotel Operating Co, 83 Ariz. 40, 316 P.2d 290 (1957).

Under the Uniform Contribution Among Tortfeasors Act, joint and several liability is preserved for true joint tortfeasors, including those "acting in concert" and those who are vicariously liable for the fault of others.

The purpose of Rule 19 (a), Ariz. R. Civ. P., is to insure the joinder of all interested parties in a single action and avoid a multiplicity of litigation. Arizona Title Ins. & Trust Co. v. Kelley, 11 Ariz. App. 254, 463 P.2d 838 (1970).

CONCLUSION

In his dismissal with prejudice of the Davidsons' federal cause of action on November 24th, 2003, (U.S. District Court Case # 03-CV-110-TUC-FRZ), Trial Judge Frank R. Zapata stated,

> *"Plaintiffs [the Davidsons] have an adequate state forum in which to pursue the issues presented."*

The Davidsons, therefore, pray for this Court to grant their Motion to Amend Defendants' Answer to Add Counterclaims, and Add Parties.

RESPECTFULLY SUBMITTED, on this 26th Day of February, 2004,

By /s Robert M. Davidson /s Vanessa E. Komar
Robert M. Davidson, Defendant/Counterclaimant, Pro Se
& Vanessa E. Komar, Defendant/Counterclaimant

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar, Plaintiffs, vs.	)	No. CV 03-580-TUC-FRZ
	)	**ORDER**
Michael J. Meehan; Quarles & Brady Streich Lang, Defendants	)	(Filed Feb. 2, 2004)

The present action commenced with the filing of Plaintiffs' Original Complaint & Application for Injunctive Relief against Defendants Michael J. Meehan and Quarles & Brady Streich Lang. The pleading alleges, inter alia that "[t]he Arizona state courts...have effectively stripped the Davidsons of their former attorney of record...without Due Process or Equal Protection, a violation of the Contract Clause, Takings Clause, and 14th Amendment of the U.S. Constitution."[1]

Plaintiffs' claims appear to arise from a state court ruling granting a motion to withdraw as attorney of record in state court proceedings, filed by Defendant Meehan, who had been retained to represent Plaintiffs in the state court action. Plaintiffs' complaint refers repeatedly to facts and allegations arising out of state court proceedings and a previously filed district court action, which was dismissed on November 23, 2003, four days after the filing of this action on November 20, 2003, in which Plaintiffs had similarly

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[1] Plaintiffs' Original Complaint & Application for Injunctive Relief, Page 5, ¶ 24.

moved for injunctive relief.

Defendants filed a Motion to Dismiss in response to Plaintiffs' Original Complaint & Application for Injunctive Relief on December 22, 2004, now before the Court for consideration.

Defendants move the court to dismiss the present case based on their contention that "thee is no Constitutional right to counsel in civil case" and thus, "...original subject matter jurisdiction for this case is not present." Defendants conclude that "[a]s a result, this Court cannot retain supplemental jurisdiction over plaintiffs' state law based claims and thus, the entire case should be dismissed."

Plaintiffs filed their Objection to Motion to Dismiss in response to Defendants' motion, contending that they "sought relief for this irrevocable injury in their Motion for Preliminary Injunctive Relief in U.S. District court Case 03CV-110 TUC-FRZ...presently on appeal to the 9th Circuit Court of Appeals..."

Defendants' motion to dismiss addresses Plaintiffs' cause of action on the merits of the claims asserted, arguing that Plaintiffs have failed to allege the infringement of a constitutionally protected right, specifically a constitutional right to counsel in a civil case, and therefore, there is no basis for federal subject matter jurisdiction. The Court finds however, that Plaintiffs' cause of action has not been brought properly before this Court.

The Court dismissed Plaintiffs' previous action by Court order and judgment, filed November 24, 2003, under the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which Plaintiffs moved for injunctive relief, alleging:

> Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case #

> 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises.* PIMA County Superior Court Case # 333954 *arises from* the same nucleus of operative facts alleged by the Davidsons in US District Court Case #03CV 110-TUC-FRZ.

In dismissing the previous action, the Court found that "[a]lthough Plaintiffs' initial filings were incomprehensible, it is clear to the Court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending state judicial proceedings."

The Court further held that "[I]t is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injuction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse of federal judicial resources." The Court further explained that it "need not address the principles of judicial estoppel which also preclude the filing of this action in federal court" and that "[I]t is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested by Plaintiffs in their motion for injunctive relief."

The Court concluded that Plaintiffs have an adequate state forum in which to pursue the issues presented. Plaintiffs filed a notice of appeal.

In the present action, Plaintiffs appear to be attempting to raise issues arising from the same cause of action and events that originated in the Arizona state courts. Plaintiffs' Original Complaint & Application for Injunctive Relief fails to comply with the requirements of

Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." These requirements were set forth by Court order in the previous action, CV 03-110-TUC-FRZ, along with the warning that "[a]lthough the pleadings of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure." *See* Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995). Plaintiffs' Original Complaint & Application for Injunctive Relief includes, but is not limited to, the following allegations:

> Opposing counsel in Pima County Case 333954 inappropriately aligned their interests with those of Mr. Meehan and Q&BSL during the Davidsons' appellate action to the Arizona court of Appeals as is amply demonstrated by their Answer Brief and Opposition to Petition for Review.
>
> The *possibility* of a prior association between any of the counsel of the firm Quarles & Brady LLP [in any state or federal jurisdiction] and any of the named defendants [or their Counsel] in U.S. District Court Case # 03CV-110-TUC-FRZ, is of grave concern to the Davidsons. The Davidsons pray for this court to allow discovery on this question. Such a question is readily subject to discovery, *assuming that any records documenting such an association have not been destroyed.* This is particularly relevant at this time because a number of the named corporate defendants [Vivra Inc, Magellan Specialty Health Inc, Allied specialty Care Services Inc, and i-Health Technologies Inc] in Case # 03CV-110-TUC-FRZ are presently in the process of disposing of their

assets [and records?] in a Chapter 11 Bankruptcy proceeding filed on March 11, 2003, in the U.S. Bankruptcy Court, Southern District of New York [In Re: Magellan Health Services Inc., Case No. 03-40515 (PCB), Jointly Administered]. Case # 03CV-110-TUC-FRZ is presently stayed by the filing for Automatic Stay under the Bankruptcy Code.

As of the filing of this complaint, Mr. Meehan appear no longer to be an associate of the law firm Quarles & Brady Streich Lang. According to the State Bar of Arizona Member Finder, Mr. Meehan *now* works for the law firm, The Law Offices of Michael J. Meehan, and he appears to *now* no longer be an associate of Quarles & Brady Streich Lang. Thus, Mr. Meehan is an attorney who has moved between law firms, *frequently*. The plaintiffs will produce evidence at trial that this movement between law firms [during Mr. Meehan's attorney-client relationship with the Davidsons] inured to detriment of his clients (the Davidsons) in Pima County Case #333954, in more ways than one. This movement between law firms was not part of the benefit bargained-for when the Davidsons retained Mr. Meehan as their legal counsel in Pima County Case #333954.[2]

As evidence by Plaintiffs' Exhibits in Support of Objection to Motion to Dismiss, this case centers around the state court controversies the Plaintiffs tried to raise in their previous federal action. The Court again, finding that Plaintiffs have an adequate state forum in which to pursue the issues presented, invokes the doctrine of

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[2] Plaintiffs' Original Complaint & Application for Injunctive Relief, ¶¶ 39, 40, and 41.

abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), which "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.CT. 2515, 2521 (1982). The Court does not find extraordinary circumstances to intercede in the ongoing state court proceedings in which Plaintiffs have adequate opportunity to litigate any alleged federal claims. See Id.

Notwithstanding this finding, as Defendants assert, "it is well-established that there is generally no constitutional right to counsel in civil cases." United State v. Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996)(citing Hedges v. Resoluntion Trust Corp., 32 F.3d 1360, 1363 (9th Cir. 1994), cert. Denied, 514 U.S. 1082, 115 S.Ct. 1792 (1995)).

Based on the foregoing,

IT IS HEREBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

Judgment shall be entered accordingly.

DATED this 30th day of January, 2004.

/s FRANK R. ZAPATA
United States District Judge

APPENDIX M

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MANDATE
2 CA-CV 2002-0051
Department B, Pima County
Cause No. 333954
(Filed Nov. 26, 2003)

RE: GROSSMAN v. DAVIDSON

To: The Superior Court of Pima County and the Hon. Jane L. Eikleberry, Judge, in relation to Cause No. 333954.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This court rendered its Memorandum Decision and it was filed on February 27, 2003.

No Motion for Reconsideration was filed and the time for filing such has expired.

A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

PLAINTIFFS/APPELLEES are granted attorney's fees on appeal in the amount of six Thousand Seven Hundred Sixty-Seven and 50/100 Dollars ($6,767.50) and granted costs on appeal in the amount of Two Hundred Eleven and 01/100 Dollars ($211.01) by the Arizona Court of Appeals, Division Two.

NOW THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the Memorandum Decision of this Court, a copy of which is attached Hereto.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the attachment to be a full and accurate copy of the Memorandum Decision filed in this cause on February 27, 2003.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division Two, on November 26, 2003.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar, Plaintiffs vs.	)	No. CV 03-110-TUC-FRZ
	)	**ORDER**
Vivra Inc, et al., Defendants	)	(Filed Nov. 24, 2003)

Before the Court for consideration is "Plaintiffs' Motion for Preliminary Injunctive Relief by this Court," filed October 21, 2003. Filed in response is "Defendants Jay and Eudice Grossman's Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief."

Procedural History

Plaintiffs Robert M. Davidson and Vanessa E. Komar, proceeding pro se, filed "Plaintiff's Original Complaint" on February 19, 2003, against 22 named corporate and individual Defendants. The 191 page original complaint alleged 21 counts.

On March 11, 2003, Plaintiffs filed a 144 page RICO Case Statement, with several exhibits attached.

On April 30, 2003, Plaintiffs filed a 328 page First Amended Complaint, against the same 22 named Defendants, alleging 17 separate counts.

On June 6, 2003, Defendants Grossman appeared and filed Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8, Federal Rules of Civil Procedure."

On July 1, 2003, the Court granted Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8 based on the Court's finding "that the prolixity of the First Amended Complaint renders the pleading incomprehensible."

This matter was also stayed pursuant to the Notice of filing of Bankruptcy Petition and of the Automatic Stay filed by Defendants Vivra, Inc., Magellan Specialty Health, Inc. And Allied Specialty Care Services, LLC.

Plaintiffs were granted leave to file a Second Amended Complaint upon the lifting of the automatic stay in compliance with the pleading requirements of the Federal Rules of Civil Procedure and in accordance with the provisions of the Court's Order, specifically Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity."

Plaintiffs were warned that "[a]lthough the pleadings of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)."

Discussion

Although this cause of action is still under the automatic stay provision pursuant to the filing of a bankruptcy provision, Plaintiffs filed the present motion seeking injunctive relief.

There is no operative complaint before the Court.

Plaintiffs' motion seeks "preliminary injunctive relief from this Court in the form of:"

> (a) an Order by this Court for a Stay of Pima County Superior Court Case #333954, pending final adjudication of the federal cause of action (Case #03-110) from which it arises,
>
> (b) an Order by this Court for a Stay of the award of Costs [$211.01] and Attorney's Fees [$6,767.50] to the Grossmans in Arizona Court of Appeals Case #2 CA-CV 02-0051, pending final adjudication of the federal cause of action (Case

> #03-CV 110) from which it arises, and
> (c) an Order by this Court for a Stay of the award of Costs [$82.00] and Attorney's Fees [$1,710.00] to the Grossmans in Arizona Supreme Court Case #CV-03-0148-PR, pending final adjudication of the federal cause of action (Case #03-CV 110) from which it arises, and
> (d) an Order for any other relief this Court deems appropriate.

Plaintiffs base their argument in their motion for injunctive relief on the following:

> Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case # 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises*. PIMA County Superior Court Case # 333954 *arises from* the same nucleus of operative facts alleged by the Davidsons in US District Court Case # 03CV 110-TUC-FRZ. There is a distinct risk of issue preclusion or claim preclusion, if Pima County Superior Court Case # 333954 proceeds to trial prior to the final judgment upon the merits of 03CV-110-TUC-FRZ.

Although Plaintiffs' initial filings were incomprehensible, it is clear to the court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending state judicial procedings. It is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injunction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse

of federal judicial resources.

It is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested by the Plaintiffs in their motion for injunctive relief. The Court need not address the principles of judicial estoppel which also preclude the filing of this action in federal court.

The Court thereby invokes the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which the Supreme Court "espouse[d] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.CT. 2515, 2521 (1982)). "Absent extraordinary circumstances, Younger abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." Id.

Plaintiffs have an adequate state forum in which to pursue the issues presented.

Based on the foregoing,

IT IS HEREBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

IT IS FURTHER ORDERED that all other pending matters are **DENIED** as moot.

There shall be no further filings in this action.

DATED this 20th day of November, 2003.

/s Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civil Action for Compensatory, Special, And Punitive Damages Under 28 USC Section 1331 and 28 USC Section 1367 for Breach of Fiduciary Duty, Professional Negligence, and Legal Malpractice

Case No. CIV 03-580 TUC JMR

PLAINTIFFS' ORIGINAL COMPLAINT & APPLICATION FOR INJUNCTIVE RELIEF
(Filed Nov. 20, 2003)

Robert M. Davidson;

Vanessa E. Komar;

Plaintiffs

vs

Jury Demand

Michael J. Meehan;

Quarles & Brady Striech Lang;

Defendants

(a) Stay this lawsuit, *pending final adjudication upon the merits of U.S. District Court Case # 03CV-110-TUC-FRZ, the federal cause of action from which Pima County Superior Court Case 333954 arises.*
(b) Enter judgment for plaintiffs and award the plaintiffs $15MM in compensatory and $60MM in punitive damages, against the defendants and each of them and in favor of the plaintiffs.
(c) Award cost of court.
(d) Award actual damages (including damages for personal injury and economic injury, the full extent of which is not presently known to the plaintiffs), consequential damages, Special damages (as described, in part, above, the full extent of which is not presently known to the plaintiffs), punitive damages, interest, court costs and attorney fees from the defendants.
(e) Grant any other relief it deems appropriate.

Respectfully submitted,

/s Robert M. Davidson /s Vanessa E. Komar

By: _____

Robert M. Davidson, Pro Se, and
Vanessa E. Komar, Pro Se

APPENDIX P

SUPREME COURT OF ARIZONA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,	)	Arizona Supreme Court No. CV-03-0148-PR
	)	Court of Appeals Division Two
Plaintiff/Appellee,	)	No. 2 CA-CV 02-0051
v.	)	Pima County Superior Court
ROBERT MICHAEL DAVIDSON	)	No. 333954
Defendant/Appellant	)	**ORDER**
	)	(Filed Sep. 15, 2003)

On August 8, 2003, this Court issued a minute letter granting Attorneys' Fees to Appellees Jay Grossman and Eudice Grossman. A "Plaintiffs-Appellees' Verified Itemized Statement of Costs and Attorney's Fees" was filed on August 22, 2002. Pursuant to Rule 21, Rules of Civil Appellate Procedure and this Court's minute letter of August 8, 2003, and the Clerk having been authorized to tax costs and attorneys fees, and no objection having been received from Appellant Robert Michael Davidson.

IT IS ORDERED granting Appellees Jay Grossman and Eudice Grossman attorney's fees in the amount of One Thousand Seven Hundred Ten and 00/100 Dollars ($1,710.00) and costs in the amount of Eighty-Two and 00/100 Dollars ($82.00).

DATED this 15th day of September, 2003.

/s NOEL K. DESSAINT
Clerk of the Court

APPENDIX Q

Commission on Appellate
Court Appointments

News Release

FOR IMMEDIATE RELEASE
March 28, 2003

10 Applicants Being Considered For Arizona Court of Appeals

The public is asked for comments on 10 applicants for an opening on Division Two of the Arizona Court of Appeals. The vacancy was created by the retirement of Judge William Druke.

Beth C. Beckmann, Christina M. Cabanillas, Barry M. Corey, Peter J. Eckerstrom, Jean K. Gage, Elliot A. Glicksman, Stephen H. Lesher, Lawrence McDonough, Grace McIlvain and Michael J. Meehan are being considered.

The Commission on Appellate Court Appointments will review the applications and hear comments at a public meeting on April 14. The meeting will be held at the Four Points Sheraton in Tucson, 1900 E. Speedway Boulevard, starting at 10:00 a.m. Citizens may address the commission at that time or send written comments to 1501 W. Washington, Suite 227, Phoenix, AZ, 85007 or to: jnc@supreme.sp.state.az.us. Comments must be received by April 10 to be considered. Anonymous comments cannot be considered.

At the April 1 meeting the commission will decide which applicants will be interviewed for the opening. The selected applicants will be interviewed on April 28. After the interviews the commission will recommend at least three nominees to Governor Janet Napolitano, who will appoint the new judge.

APPENDIX R

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife, Plaintiffs/Appellees,	) 2 CA-CV 2002-0051) DEPARTMENT B)
v.	) **MEMORANDUM**) **DECISION**) Not for Publication
ROBERT MICHAEL DAVIDSON, Defendant/Appellant	) Rule 28, Rules of) Civil Appellate) Procedure

(Filed Feb. 27, 2003)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. 333954
Honorable Jane L. Eikleberry, Judge

APPEAL DISMISSED

DRUKE, Presiding Judge.

¶1 Jay and Eudice Grossman sued Robert and Vanessa Davidson for defamation, slander, and other related counts. Four months before trial, the Davidsons' attorney moved to withdraw as counsel and to continue the trial. The Davidsons did not respond to the motion and the Grossmans had no objection to it. On January 11, 2002, the trial court entered an order granting the motion to withdraw and rescheduled the trial. On February 13, Robert Davidson filed a notice of appeal "from the order made and entered in this action on the 11th day of January, 2002."[1] For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

[1]Both the notice of appeal and the opening brief state that Robert Davidson is "representing" the defendants. He may represent himself, but because he is not an attorney admitted to the practice of law, he cannot represent his wife. *See Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 427 P.2d 378 (1967).

¶2 In a civil case, "the right to appeal is not absolute but exists only by statute." *Southern Cal. Edison Co. v. Pebody W. Coal Co.*, 194 Ariz. 47, ¶ 16, 977 P.2d 769, ¶ 16 (1999); *see also In re Pima County Juvenile Action No. S-933*, 135 Ariz. 278, 660 P.2d 1205 (1982) (substantive right to appeal created only by consitution or statute). Civil appeals are governed by A.R.S. § 12-2101, which limits this court's jurisdiction to those matters set forth in the statute. *See* Ariz. Const. Art. VI § 9; A.R.S. § 12-120.21; *Truck Ins. Exch. v. State Compensation Fund*, 138 Ariz. 116, 117, 673 P.2d 314, 315 (App. 1983) ("[T]he right to appeal and orders which are reviewable on appeal are strictly statutory."); *Campbell v. Arnold*, 121 Ariz. 370, 590 P.2d 909 (1979) (court of appeals only has jurisdiction given by statute).

¶3 The Grossmans point out that the order granting counsel's motion to withdraw does not come "within any of the categories of appealable orders." In response, Davidson asserts that this appeal comes within § 12-2101 (D), which permits an appeal "[f]rom any order affecting a substantial right made to any action when the order in effect determines the action and prevents judgment from which an appeal might be taken." He argues that "[t]he substantial rights in this appeal are the Constitutionally-protected rights to Due Process, Equal Protection, and right to Contract" and that "[t]he order appealed from, in effect, determine[d] the action." (Emphasis omitted.)

¶4 Although we might agree that the rights to which Davidson refers are substantial, we cannot agree that the trial court's order permitting his counsel to withdraw determined the action that the Grossmans filed against him. That "order did not finally dispose of the case, leaving no question open for judicial determination." *Eaton v. Unified Sch. Dist. No. 1 of Pima County*, 122

Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979). The order simply allowed Davidson's attorney to withdraw his representation and continued the date for a trial on the merits. The order was, in fact, interlocutory, this, "interim or temporary, not constituting a final resolution of the whole controversy." *Black's Law Dictionary* 819 (7th ed. 1999). And interlocutory orders are generally nonappealable. *See Southern Cal Edison,* 194 Ariz. 47, ¶ 16, 977 P.2d 769, ¶ 16 (legislature's express listing in § 12-2101 of appealable judgments and orders makes clear that "*most interlocutory orders...* are not appealable"); *Security Gen. Life Ins. Co. v. Superior Court,* 149 Ariz. 332, 333, 718 P.2d 985, 986 (1986) (order disqualifying counsel from representing party "is not a final order and is therefore not appealable"); *Riley, Hoggatt & Suagee, P.C. v. Riley,* 165 Ariz. 138, 796 P.2d 940 (App. 1990) (order denying counsel's motion to withdraw representation not appealable); *Eaton* (§ 12-2101(d) does not permit appeal from interlocutory order allowing case to proceed as class action). Accordingly, we conclude that the trial court's order allowing Davidson's counsel to withdraw is a nonappealable interlocutory order.

¶5 But even if we were to assume that the order is appealable, because Davidson did not file his notice of appeal until February 13, it was not filed within the thirty days required by Rule 9(a), Ariz. R. Civ. App. P., 17B A.R.S. The relevant part of Rule 9(a) states that a "notice of appeal... shall be filed with the clerk of the superior court not later than 30 days after the entry of judgment from which the appeal is taken." Rule 2(d), Ariz. R. Civ. App. P., defines "[j]udgment" as "any appealable order, whether denominated an order, a judgment, a decree, or otherwise." Thus, even if the order were appealable, we would still lack jurisdiction to review it because Davidson failed to timely file the notice of

appeal. *See Butler Products Co. v. Roush,* 145 Ariz. 32, 32, 699 P.2d 906, 906 (App. 1984) (" Appellate courts do not have jurisdiction to consider appeals which are not timely filed."); *Pima County No. S-933 (*failure to file timely appeal deprives appellate court of jurisdiction).

¶6 For the foregoing reasons, we dismiss for lack of jurisdiction Davidson's appeal from the trial court's January 11 interlocutory order granting his attorney's motion to withdraw as counsel. We also grant the Grossmans costs and attorney's fees on appeal, finding, for the reasons set forth in the answering brief, that Davidson filed a frivolous appeal. Ariz. R. Civ. App. P. 25, 17B A.R.S. Costs and attorney's fees will be awarded to the Grossmans upon their compliance with Rule 21, Ariz. R. Civ. App. P.

/s WILLIAM E. DRUKE, Presiding Judge

CONCURRING:

/s PHILIP G. ESPINOSA, Chief Judge
/s JOHN PELANDER, Judge

APPENDIX S

Commissions on Appellate and Trial Court Appointments

NOTICE OF PUBLIC MEETING

The Commission on Appellate Court Appointments will meet at 10:00 a.m. on December 13, 2002, to review applications from the following persons for a vacancy on the Arizona Supreme Court: William Scott Bales, Ernest Calderon, David R. Cole, Barry M. Corey, Andrew M. Federhar, Andrew D. Hurwitz, Gregory J. Kuykendall, Michael J. Meehan, John E. Osborne, A. John Pelander III and William H. Ricker.

The public may address the commission about any of the candidates at 10:00 a.m. on December 13, 2002. Public comment will only be accepted at the 10:00 a.m. hearing.

Written comments can be sent to 1501 W. Washington, Suite 227, Phoenix, AZ 85007. Comments should arrive by December 5 to be considered. Anonymous comments cannot be considered.

The meeting is open to the public. It will be held in Phoenix at the Arizona State Courts Building, 1501 West Washington Street, Conference Room 345. A copy of the agenda may be obtained from the Human Resources Division, Administrative Office of the Courts, 1501 West Washington, Suite 227, Phoenix, Arizona, 85007, or by calling (602) 542-9311.

After taking public comment and reviewing the applications, the Commission will conduct a public vote on the candidates to be interviewed for the vacant position.

APPENDIX T

COMMISSION ON
APPELLATE COURT APPOINTMENTS

AGENDA

May 10, 2002 Phoenix, Arizona

8:30 a.m. Call to Order...Chief Justice Charles E. Jones
8:30 a.m. Call for Public Comment...Chief Justice Jones

Disqualifications and Disclosures...All Members

8:45 a.m. Interviews of Applicants:

8:45 Sheldon H. Wisberg
9:30 Michael J. Meehan
10:15 -Break-
10:30 Michael D. Ryan
11:15 J. William Brammer, Jr.

12:00 p.m. Lunch
12:45 p.m. Interviews Resume:

12:45 Cecil B. Patterson, Jr.
1:30 Michael C. Nelson
2:15 -Break-
2:30 A. John Pelander III
3:15 Andrew D. Hurwitz

4:00 p.m. Discussion of Applicants and Interviews
Note: This discussion may include one or more executive sessions, if necessary for frank discussion of the candidates' qualifications, upon motion and approval by two-thirds of the members in attendance.
Selection of Nominees
Note: All voting will be conducted in public session in accordance with Rule 9.e.5., Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments.

APPENDIX U

Document Display April 15, 2002
Section: City State Page: 4C
Tucson Citizen

7 Tucsonans up for high court seat

Staff
Tucson Citizen

36 people apply for 2 vacancies on Pima's Superior Court
Citizen Staff Report

Seven Tucsonans are being considered for an opening on Arizona's Supreme Court.

The opening will be created by the retirement of Thomas Zlaket, a Tucsonan who plans to step down April 30.

The Tucsonans among the 15 applicants are:

Robert L. Beal Jr., J. William Brammer Jr., Barry M. Corey, Stephen H. Lesher, Michael J. Meehan, Clark W. Munger and A. John Pelander.

A commission will hear comments on the Supreme Court applicants at a public meeting beginning at 2 p.m. April 24 in Phoenix at the Arizona State Courts Building, 1501 W. Washington St., Conference Room 345.

Written comments also will be accepted until Friday. They should be mailed to the state courts building, Suite 227, Phoenix, 85007. Anonymous comments will not be considered.

Applicants will be interviewed May 10.

Public comment also is being sought on 36 applicants for two vacancies on the Pima County superior Court bench.

APPENDIX V

THE LAW FIRM OF
KARP, HEURLIN & WEISS, P.C.
3060 NORTH SWAN ROAD, SUITE 100
TUCSON, ARIZONA 85712-1225
TEL (520) 325-4200
FAX (520) 325-4224
Bruce R. Heurlin, PCC# 25508
Attorneys for Jay Grossman and Eudice Grossman

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.

No. C 333954

ORDER

(Judge Jane L. Eikleberry)

ROBERT MICHAEL DAVIDSON and VANESSA KOMAR,
Defendants/Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN,
Plaintiffs/Counterdefendants.

Upon Quarles & Brady Streich Lang's Motion to Withdraw as Counsel of Rcord and to Continue Trial, and good cause appearing therefor,

IT IS HEREBY ORDERED that the motion to withdraw as counsel of record is GRANTED.

IT IS HEREBY ORDERED that ROBERT DAVIDSON and VANESSA KOMAR are required to have new counsel file a notice of appearance by _ 8 Feb 2002

IT IS HEREBY FURTHER ORDERED that the March 26, 2002, trial date is vacated and reset to 29 May 2002, at 9:00 a.m. and that the pretrial deadlines are continued as follows:

	From	To
Status conference	1/28/02	4-1-02
Disclosure/discovery	1/25/02	See Trial Notice
Dispositive motions	1/25/02	7-14-20
Motions in Limine	2/11/02	"
Responses to Motions in Limine	2/26/02	"
Joint Pretrial Statement	3/07/02	"
Meet with Clerk re: Exhibits, week of	3/17/02	"
Jury Instructions/Voir Dire	3/22/02	5-24-02
Trial	3/26/02	5-29-02

Dated: January 11, 2002.

/s Jane L. Eikleberry
Judge of the Superior Court

Conformed copy mailed/faxed
_____, 2001, to:

Michael J. Meehan
Shannon L. Giles
Quarles & Brady/Streich Lang, P.A.
1 S. Church Avenue #1700
Tucson, AZ 85701-1621
Attorney for Robert Michael Davidson and
Vanessa Davidson aka Vanessa E. Komar

Dr. Robert Davidson and Vanessa Komar
2427 East First Stret
Tucson, AZ 85719

APPENDIX VV

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants

Case No. 333954

NOTICE OF CHANGE OF ADDRESS

(Judge Jane L. Eikleberry)

ROBERT MICHAEL DAVIDSON and VANESSA KOMAR, Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN, Counterdefendants

ROBERT MICHAEL DAVIDSON, representing the Defendants/Counterclaimants without an attorney, hereby informs the Court that his address has changed and all further filings, documents and other mailings relating to this matter should be sent to him at the following address:

P.O. Box 1785, Kilgore, TX 75663-1785

DATED this 5th day of February, 2002.

/s Robert Michael Davidson
/s Vanessa Komar

APPENDIX VVV

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants

Case No. 333954

NOTICE OF APPEARANCE

(Judge Jane L. Eikleberry)

ROBERT MICHAEL DAVIDSON and VANESSA KOMAR, Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN, Counterdefendants

PLEASE TAKE NOTICE that ROBERT MICHAEL DAVIDSON, representing the Defendants/Counterclaimants without an attorney, hereby makes his appearance in this action and hereby requests that all further filings, documents and other mailings relating to this matter and Defendants/Counterclaimants be sent to him at the following address:

P.O. Box 1785, Kilgore, TX 75663-1785

DATED this 5th day of February, 2002.

/s Robert Michael Davidson
/s Vanessa Komar

APPENDIX VVVV

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants

Case No. 333954

NOTICE OF APPEAL

(Judge Jane L. Eikleberry)

ROBERT MICHAEL DAVIDSON and VANESSA KOMAR, Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN, Counterdefendants

Notice is hereby given that ROBERT MICHAEL DAVIDSON, representing the Defendants/counterclaimants without an attorney, appeals to the Court of Appeals of the State of Arizona from the order made and entered in this action on the 11th day of January, 2002. Specifically, the order "that the motion [by Quarles & Brady Streich Lang LLP] to withdraw as counsel of record is granted" is appealed.

DATED this 11th day of February, 2002.

/s Robert Michael Davidson

APPENDIX W

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	Administrative
ELECTION OF CHIEF JUSTICE	)	Order No. 2001-
AND VICE CHIEF JUSTICE	)	-119
	)	

The terms of Justice Thomas A. Zlaket as Chief Justice and Justice Charles E. Jones as Vice Chief Justice expire on January 7, 2002. Pursuant to Article VI, § 3 of the Arizona Constitution, the members of the Court met at a special administrative conference on February 15, 2001 to elect the Chief Justice and Vice Chief Justice for the term beginning January 8, 2002. Therefore,

IT IS ORDERED that the term of the Honorable Thomas A. Zlaket as Chief Justice shall expire at midnight on Monday, January 7, 2002.

IT IS FURTHER ORDERED that the Honorable Charles E. Jones shall serve as Chief Justice of the Arizona Supreme Court for a five-year term beginning at 12:01 a.m. on Tuesday, January 8, 2002.

IT IS FURTHER ORDERED that the Honorable Ruth V. McGregor shall serve as Vice Chief Justice of the Arizona Supreme Court for a five-year term beginning at 12:01 a.m. on Tuesday, January 8, 2002.

Dated this 19th day of December, 2001.

THOMAS A. ZLAKET
Chief Justice

APPENDIX X

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife,
Defendants.
ROBERT MICHAEL DAVIDSON and VANESSA KOMAR,
Counterclaimants,
vs.
JAY GROSSMAN and EUDICE GROSSMAN,
Counterdefendants.

No. 333954

MOTION TO WITHDRAW AS COUNSEL OF RECORD AND TO CONTINUE TRIAL

Assigned to the Honorable Jane L. Eikleberry

Pursuant to Rule 5.1(a)(2)(B), Ariz. R. Civ. P., Quarles & Brady Streich Lang LLP ("Q&BSL") respectfully moves the Court for an order permitting it to withdraw as counsel for Robert Davidson and Vanessa Komar in this matter. Because the application does not contain the written approval of the clients, the applicable rule requires that a motion be brought including the

clients' names, addresses and telephone number. The clients names, addresses and telephone number are as follows:

> Dr. Robert Davidson and Vanessa Komar
> 2427 East First Street
> Tucson, Arizona 85719
> Telephone: (520) 318-3629

Rule 5.1(a)(2)(C) states that no attorney shall be permitted to withdraw as attorney of record after an action has been set for trial unless one of two criteria are met. *See* Rule 5.2(a)(2)(C), Ariz. R. Civ. P. Counsel respectfully submits that the second criteria, "good cause," is met under the present circumstances.

Ethical Rule 1.16 (b) of the Arizona Rules of Professional Conduct states:

> .....a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if:
> (1) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; . . .
> (6) other good cause for withdrawal exists.

The undersigned attorney has represented Dr. Robert Davidson and his wife, Vanessa Komar, in this matter since approximately October of 1999. During the representation, Dr. Davidson has insisted, and continues to insist, on pursuing objectives in this litigation that I believe to be very imprudent and contrary to the Arizona Rules of Civil Procedure, but which cannot be described more fully because they constitute privileged communications between attorney and client. In addition, communication with Dr. Davidson has been problematic in a manner that cannot be described more fully in light

of the attorney-client privilege. Dr. Davidson is now encouraging me to act in a manner that I believe is unprofessional and incompetent, while at the same time making threats of malpractice. All of these factors have resulted in a failure of communication and lack of trust which prevents Q&BSL from continuing to represent Dr. Davidson and Ms. Komar effectively in this matter.

It should also be noted that withdrawal of counsel will not have a "material adverse effect" on the clients' interests. There are almost four months remaining before the currently scheduled trial date of March 26, 2002. Discovery is at the stage of document exchange and no depositions have been taken. The clients will have ample opportunity to substitute counsel without prejudice to their case. Nevertheless, in order to give the clients every available opportunity to substitute counsel and prepare their case, counsel requests that the trial of this matter be continued, and is informed that plaintiffs do not object to such request.

The certificate of counsel required by Rule 5.1(a)(2)(B) regarding notification to the clients is attached hereto.

DATED this 17th Day of December, 2001.

QUARLES & BRADY STREICH LANG LLP
One South Church Avenue, Suite 1700
Tucson, Arizona 85701-1621

By /s Michael J. Meehan
Michael J. Meehan

APPENDIX XX

Quarles & Brady
Streich Lang LLP

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Madison
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Michael J. Meehan
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Phone: (520)770-8701
Fax (520) 770-2208

October 17, 2001

Dr. Robert Davidson
P.O. Box 40937
Tucson, Arizona 85717

Dear Bob:

I have your two faxes of October 15th. Let me answer your question.

It would be impossible now to remove the Grossman case against you, to the United States District Court. There are no federal questions and it has been more than a year since the Complaint was filed. Thus, the question is moot.

I have not changed my earlier view that there is no RICO claim assertable on your behalf arising out of the circumstances that we are litigating in the state court.

I hope this answers your questions.

Very truly yours,

/s Michael J. Meehan

APPENDIX Y

LAW OFFICES OF
MEEHAN & ASSOCIATES
33 NORTH STONE AVENUE, SUITE 830
TUCSON, ARIZONA 85702-1671
TELEPHONE (520) 882-4487
EMAIL: mjm@mmeehan.com

January 15, 2001

Dr. Robert Davidson
Ms. Vanessa Komar
2427 E. First Street
Tucson, AZ 85719

Dear Bob and Vanessa:

Public announcements will be made soon regarding a change that I am making, and I wanted to inform you before it became public knowledge.

I have enjoyed owning my own firm for eight years. Recently I decided to return to the thing I enjoy the most, the practice of law, unencumbered by day-to-day management and administrative responsibilities. To this end, I am merging my practice with Quarles, Brady, Streich, Lang effective February 1, 2001.

The nature of my practice will be the same: solving complex business problems using litigation, mediation and arbitration, aided by technology. I will continue to represent business people in their business disputes. I will continue to represent businesses. I am also planning to place special emphasis on my appellate practice.

This change is somewhat bittersweet and the decision was not easy. I have always enjoyed having my own firm; however, I am very excited about working with this prestigious national firm and the opportunities we can afford each other. I expect to have an enhanced ability to provide as robust (or as lean) a team of lawyers and paralegals as a case requires. I expect to have technical legal expertise in areas such as patent, intellectual property and health law to augment my own developed skills and expertise. And I believe that I will bring additional commercial litigation and appellate talents to the Quarles, Brady Streich, Lang firm.

I do not expect this to affect or impair in any way my ability to continue effective representation for you.

Regards,

/s Michael J. Meehan

APPENDIX Z

Arizona Rules of Civil Procedure

Rule 5.1 Duties of Counsel

(A) Attorney of Record: Withdrawal and Substitution of Counsel.

(2) Withdrawal and Substitution. Except where provided otherwise in any local rules pertaining to domestic relations cases, no attorney shall he permitted to withdraw. or be substituted, as attorney of record in any pending action except by formal written order of the court, supported by written application setting forth the reasons therefore together with the name, residence and telephone number of the client, as follows:

(B) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys. The motion shall he accompanied by a certificate of' the attorney making the motion that (i) the client has been notified in writing of the status of the case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions, or (ii) the client cannot he located or for whatever other reason cannot be notified of the pendency of the motion and the status of the case.

(C) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, (i) unless there shall be endorsed upon the application therefore either the signature of a substituting attorney stating that such attorney is advised of the trial date and will he prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.